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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 149.

THE CITY OF WINONA, PLAINTIFF IN ERROR,

vs.

N. A. COWDREY. Plff below

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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FILED OCTOBER 15, 1874.

Dec 29 1876
Affirmed
Jno Davis

SUPREME COURT OF THE UNITED STATES.

No. 149.

THE CITY OF WINONA, PLAINTIFF IN ERROR,

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N. A. COWDREY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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1 UNITED STATES of AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit court, before you, or some of you, between N. A. Cowdrey, plaintiff, and the City of Winona, defendant, a manifest error hath happened, to the great damage of the said, the City of Winona, defendant, as is said, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this fourth day of August, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth year.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

2 The answer of the judges of the circuit court of the United States for the district of Minnesota, in the within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Saint Paul, in the district of Minnesota, this second day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.] H. E. MANN,
Clerk.

(Indorsed:) United States Supreme Court. The City of Winona, plaintiff in error, vs. N. A. Cowdrey, defendant in error. Writ of error. Deposited in my office, Aug. 4, 1874. H. E. Mann, clerk U. S. circuit court, dist. of Minnesota.

3 In the circuit court of the United States for the district of Minnesota.

N. A. COWDREY *against* THE CITY OF WINONA. } Complaint.

The complaint of said plaintiff respectfully shows to the court and states:

That said plaintiff is a citizen of the State of New York, and that

said defendant was on the 23d day of April, 1870, and now is, a municipal corporation within said district of Minnesota, duly incorporated and organized under and by virtue of an act of the late Territory of Minnesota, entitled "An act to incorporate the city of Winona," approved March 6, A. D. 1857, and the several acts of the legislatures of the late Territory of Minnesota, amendatory of said act, and as such was duly authorized and empowered to contract as hereinafter set forth.

That heretofore, and on or about the 23d day of April, A. D. 1870, the said defendant The City of Winona, in the district aforesaid, under and by virtue of an act of the legislature of said State of Minnesota,
4 entitled "An act to authorize the city of Winona to aid in the construction of the Saint Paul and Chicago Railway," approved March 2d, 1870, did duly make, execute, and deliver unto Russell Sage and others, of the city and State of New York, its ninety (90) certain several bonds numbered fron eleven (11) to one hundred (100) both inclusive, duly signed by the mayor and recorder of said city and with the corporate seal of said city affixed thereto, and each of which said ninety bonds were one of a series of one hundred (100) bonds all of the same tenor and date, and numbered from one (1) to one hundred (100) both inclusive, in and by each of which said bonds the said defendant The City of Winona, acknowledged itself indebted to said Russel Sage and others, or bearer, in the sum of one thousand dollars, and which said sum said defendant thereby promised to the bearer of said bond on the first day of January, 1891 in the city of New York, with interest thereon from the first day of January, 1871, at the rate of six per centum per annum, payable semi-annually at the Importers and Traders' National Bank in the city of New York, on the first day of January and July in each year on the presentation and surrender of the coupons
5 annexed to said bond as they severally became due; a copy of the first of which said ninety bonds (numbered eleven) is hereto annexed for more particular description.

That there was then and there annexed unto each of said bonds of said series forty (40) coupons, each of which were numbered to correspond with the said bonds duly made and executed by said defendant, in pursuance of the said act of said legislature above referred to, and signed by the mayor and city recorder of said city contemporaneously with the aforesaid bonds to which they were annexed, respectively, at the date of the delivery thereof for the accruing semi-annual interest thereon; all of which said several coupons were of like tenor and form, and in and by each of which the said defendant promised to pay to bearer thereof, at the Importers and Traders' Bank, in the city of New York, thirty ($30) dollars, for interest due on the said bond to which the same was attached at the times specified in each of said coupons, that is to say, the first of said coupons attached and annexed to each of said series of bonds was payable, by the terms thereof, on the first day of July,
6 A. D. 1871; the second of said coupons, attached and annexed as aforesaid, was payable, by the terms thereof, on the first day of January, A. D. 1872; the third of said coupons, attached and annexed as aforesaid, was payable, by the terms thereof, on the first day of July, A. D. 1872; the fourth of said coupons, attached and annexed as aforesaid, was payable, by the terms thereof, on the first day of January, 1873, and so on to the end, the coupons attached and annexed to said series of bonds fixing the time for the payment of the several installments of semi-annual interest to accrue upon each of said bonds of said series, and being the same coupons referred to in said series of bonds as aforesaid.

And said plaintiff further states that each and every of the said series of bonds showed upon the face thereof the object for which they were issued.

That afterwards, and before the maturity of said coupons, or any of them, the said Russel Sage, and others, for a valuable consideration to them paid by this plaintiff, duly assigned, transferred, and delivered unto this plaintiff all the coupons attached and referred to in said ninety bonds, numbered from eleven to one hundred, both inclu-
7 sive, which became due and payable on the 1st day of July, 1871, on the 1st day of January, 1872, on the 1st day of July, 1872, and on the 1st day of January, 1873, and said plaintiff is now the lawful owner and holder thereof.

That afterwards, and when and as the said four several coupons referred to in each of said ninety (90) bonds, numbered from 11 to 100, inclusive, became due and payable, the same were severally presented for payment at the Importers and Traders' National Bank, in the city of New York, the place of payment therein named, and the payment thereof was then and there duly demanded and refused; and that said defendant has ever since failed and refused to pay said coupons or any part thereof, altho' thereto often requested.

That there is now justly due from said defendant to this plaintiff upon the first of the coupons attached and annexed to said ninety bonds numbered from 11 to 100, inclusive, the sum of twenty-seven hundred dollars and the current rate of exchange thereon on New York, with interest on said sums from and since the 1st day of July, 1871; and also upon the second of said coupons attached and annexed to said ninety bonds
8 the further sum of twenty-seven hundred dollars, with exchange thereon as aforesaid, and interest on said sums from and since the first day of January, A. D. 1872; and also upon the third of said coupons attached and annexed to said ninety bonds the further sum of twenty-seven hundred dollars, with exchange thereon as aforesaid, with interest on said sums from and since the 1st day of July, A. D. 1872; and also upon the fourth of said coupons attached and annexed to said ninety bonds the further sum of twenty-seven hundred dollars, with exchange thereon as aforesaid, and interest on said sums from and since January 1st, A. D. 1873; that the current rate of exchange at the city of Saint Paul, in said district, on the city of New York at the date of the maturity of each of said several coupons was one quarter of one per cent.

Wherefore said plaintiff demands judgment against said defendant for the sum of ten thousand eight hundred and twenty-seven dollars ($10,827) for principal and exchange due on said coupons, with interest on the sum of $2,706.75 from and since July 1, 1871, and interest
9 on the sum of $2,706.75 from and since January 1st, 1872, and interest on the sum of $2,706.76 from and since July 1st, 1872, and interest on the sum of $2,706.75 from and since January 1, 1873, besides the costs and expenses of this suit.

HARVEY OFFICER,
Plaintiff's Attorney, Saint Paul, Minn.

THE STATE OF MINNESOTA,
Ramsey County, ss:

Harvey Officer came personally before me, and, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above-entitled action; that he has read the foregoing complaint, and that the same is true to the best of his knowledge, information, and belief; and

that the reason why said complaint is not verified by the said plaintiff, is, that he is now absent from and resides out of the county and State aforesaid, where this deponent, his said attorney, resides.

HARVEY OFFICER.

Subscribed & sworn to before me, at St. Paul, this 29th day of May, A. D. 1873.

[SEAL OF COURT.] H. E. MANN,
Clerk.

10 Copy of one of the ninety bonds referred to in annexed complaint.

No. 11. STATE OF MINNESOTA, CITY OF WINONA. $1,000.

Know all men by these presents that the City of Winona, in Winona County, State of Minnesota, is indebted to Russell Sage and others, of the city and State of New York, or bearer, in the sum of one thousand dollars, which they promise to pay to the bearer hereof on the first day of January, 1891, in the city of New York, with interest thereon from the first day of January, 1871, at the rate of six per centum per annum, payable semi-annually at the Importers and Traders' National Bank, in the city of New York, on the first day of January and July in each year, on the presentation and surrender of the annexed coupons as they severally become due.

This bond is one of a series of like tenor and date, issued by the City of Winona to the amount of $100,000, to aid in the construction of a railroad from St. Paul to Winona.

In witness whereof the City of Winona has caused this bond
11 to be sealed, signed, and delivered, in the corporate name, by order of the city council of said city, pursuant to their resolutions in this respect, passed April 23d, 1870.

[CORPORATE SEAL.] THE CITY OF WINONA,
(Signed) By WM. S. DREW, *Mayor.*

Attest:
(Signed) CHAS. F. SCHROTT,
City Recorder.

(Across the face:) 1,000.

Copies of the first four coupons annexed to and referred to in foregoing bond; and being exact copies of the first four coupons annexed and referred in the ninety (90) several bonds of the City of Winona, upon which coupons the annexed complaint is founded.

First.

"$30: The City of Winona will pay the bearer, on the 1st day of July, 1871, at the Importers and Traders' National Bank in the city of New York, thirty dollars; interest due that day on bond No. 11.

(Signed) "WM. S. DREW, *Mayor.*
(Signed) "CHAS. F. SCHROTT,
"*City Recorder.*"

Second.

"$30: The City of Winona will pay the bearer, on the 1st day of Jan-

uary, 1872, at the Importers and Traders' National Bank in the city of New York, thirty dollars; interest due that day on bond No. 11.

(Signed) "WM. S. DREW, *Mayor.*

(Signed) "CHAS. F. SCHROTT,
"*City Recorder.*"

12 Third.

"$30: The City of Winona will pay the bearer, on the 1st day of July, 1872, at the Importers and Traders' National Bank in the city of New York, thirty dollars; interest due that day on bond No. 11.

(Signed) "WM. S. DREW, *Mayor.*

(Signed) "CHAS. F. SCHROTT,
"*City Recorder.*"

Fourth.

"$30: The City of Winona will pay the bearer, on the 1st day of January, 1873, at the Importers and Traders' National Bank in the city of New York, thirty dollars; interest due that day on bond No. 11.

(Signed) "WM. S. DREW, *Mayor.*

(Signed) "CHAS. F. SCHROTT,
"*City Recorder.*"

STATE OF MINNESOTA,
Ramsey County, ss:

Harvey Officer came personally before me, and, being first duly sworn, deposes and says that he is atty. for plaintiff in within-entitled action, and that the foregoing are true and perfect copies of four of a series of three hundred and sixty (360) coupons described in the annexed complaint and upon which this action is founded, and in the possession of this deponent. That the copy above, numbered "first," is a true copy of ninety of said coupons; that the copy above, numbered "second," is a true copy of ninety other of said coupons; that the copy above, numbered "third," is a true copy of ninety other of said coupons; and that the copy above, numbered "fourth," is a true copy of ninety other of said coupons; and that the reason why copies of the whole of said 360 of said coupons are not annexed hereto is to avoid unnecessary prolixity, and that each and every of said coupons are ready to be produced to this court if required.

13

HARVEY OFFICER.

Subscribed & sworn to before me this 29th day of May, A. D. 1873.

[SEAL OF COURT.] H. E. MANN, *Clerk.*

14 (Indorsed:) U. S. circuit court, dist. of Minnesota. N. A. Cowdrey against The City of Winona. Complaint filed May 29, 1873. H. E. Mann, clerk. Harvey Officer, plffs. atty., St. Paul, Minn.

15 UNITED STATES OF AMERICA,
District of Minnesota, ss:

In the circuit court of the United States for the district of Minnesota.

N. A. COWDREY
against
THE CITY OF WINONA. } Summons.

The President of the United States of America to the defendant above named, greeting:

You are hereby summoned and required to answer the complaint in

this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey and State of Minnesota, and file your answer in said clerk's office within twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid the plaintiff will take judgment against you for the sum of ten thousand eight hundred and twenty-seven dollars ($10,827) for principal and exchange, with interest on the sum of $2,706.75 from July 1, 1871, and interest on the sum of $2,706.75 from January 1, 1872, and interest on the sum of $2,706.75 from July 1, 1872, and interest on the sum of $2,706.75 from January 1, 1873, besides the costs & expenses of suit.

For the marshal of the district of Minnesota to execute.

Witness the Hon. Nathan Clifford, senior associate justice of the Supreme Court of the United States of America, at Saint Paul, in said district of Minnesota, this 29th day of May, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-seventh year.

[SEAL OF COURT.] H. E. MANN, *Clerk.*

HARVEY OFFICER,
Plaintiff's Attorney.

16 DIST. OF MINNESOTA, *ss:*

I hereby certify that I served the within writ on the within-named The City of Winona, personally, by serving the same on John A. Matthews, mayor of same city, personally, at Winona, in said dist., June 2d, 1873.

R. N. McLAREN,
U. S. Marshal.

Service, $2.00; travel & ex., 15.30—$17.30.

(Indorsed:) United States circuit court, district of Minnesota. No. . N. A. Cowdrey, plaintiff, vs. The City of Winona, defendant. Summons. Filed June 7, 1873. H. E. Mann, clerk. Harvey Officer, plaintiff's attorney.

17 Circuit court of the United States, district of Minnesota.

N. A. COWDREY
vs.
THE CITY OF WINONA.

The defendant answers to the complainant herein—

1. That except as hereinafter expressly admitted, it denies the complaint and each and every averment and allegation thereof.

2. That it admits that the defendant is a municipal corporation within said district, duly incorporated and organized.

3. That by an act of the legislature of the State of Minnesota, entitled "An act to authorize the city of Winona to aid in the construction of the St. Paul Chicago Railway," approved March 2d, 1870, the defendant was authorized to make and issue its bonds to the amount of one hundred thousand dollars, with interest-coupons attached thereto, for the use and benefit of the Minnesota Railway Construction Company,

18 obligating the said city to pay the sums and amounts specified therein to Russell Sage and others, or to bearer, in twenty years from the first day of January, 1871, in the city of New York, with

interest at the rate of six per cent. per annum, payable on the first day of January and the first day of July of each year.

4. That the said Minnesota Railway Construction Company was when said law was enacted, and still is, a corporation, organized under the laws of the State of Minnesota, and engaged in the construction of the St. Paul and Chicago Railway.

5. That, in pursuance of the power conferred by said law, the defendant and said Minnesota Railway Construction Company entered into a contract, a copy of which is hereto annexed, marked "Exhibit A," and made a part of this answer.

6. That, in pursuance of said contract, the defendant made its bonds to the amount of $100,000, in the denomination of $1,000 each, with interest-coupons thereto attached, in and by which it promised to pay the sums and amounts specified therein to Russell Sage and others,
19 or to the bearer, (for the use and benefit of the Minnesota Railway Construction Company,) on the first day of January, A. D. 1891, in the city of New York, and interest thereon semi-annually at the rate of six per cent. per annum, as specified in the said coupons, which said bonds were signed by the mayor and recorder of said city, and had the corporate seal of said city affixed thereto, and said coupons were signed by said mayor and recorder, but neither said bonds nor said coupons nor any or either of them was delivered to said Minnesota Railway Construction Company, or to said Russell Sage, or to any other person except as hereinafter stated and alleged, and said contract hereto annexed (Exhibit A) sets forth the terms and conditions on which only any of said bonds or coupons were to be delivered to any one by Horace Thompson, the depositary hereinafter named.

7. That on the 3d day of April, A. D. 1870, in pursuance of said contract with said Minnesota Railway Construction Company, and at the instance and request of said company and of Russell Sage, the
20 president of said company, the defendant, by W. S. Drew, its then mayor, delivered said bonds and the coupons thereto attached as aforesaid, (with a copy of the said contract,) to Horace Thompson, the cashier of the First National Bank of St. Paul, to be by him held in trust and delivered only as stipulated, covenanted, and agreed in said contract, and the said Horace Thompson then and there accepted said bonds and coupons on the conditions aforesaid, to be held in trust as aforesaid, and then and there agreed to hold said bonds and coupons in trust as aforesaid, and not to deliver the same or any of them to the said Minnesota Railway Construction Company or to Russell Sage except as provided in said contract, and after the terms, conditions, and provisions thereof had been fully and in all respects complied with.

8. That the said Minnesota Railway Construction Company was, when organized, and when said bonds and coupons were delivered to Horace Thompson as aforesaid, composed and formed of the following persons, viz: Russell Sage, (who was and is the president of said com-
21 pany,) Henry Keep, James H. Benedict, W. S. Gurnee, John M. Burke, Fred. P. James, Henry H. Baxter, Samuel Sloan, James Buell, George Z. Scott, Selah Chamberlain, Alexander Mitchell, and this plaintiff, and the above-named persons, except Henry Keep, still compose and form said company.

9. That on the 27th day of March, 1872, the said Minnesota Railway Construction Company, by Russell Sage, its president, intending to injure, cheat, and defraud the defendant, and privately and without the knowledge of or any notice to the defendant, and without having *on its* complied with the conditions of said contract, so as to be entitled to

said bonds or coupons or any them, applied to the said Horace Thompson, cashier of said First National Bank, for said bonds and coupons, and for the possession and custody thereof, and the said Thompson then and there, wrongfully and illegally, and without giving any notice to the defendant, delivered said bonds and coupons to the said Construction Company or to Russell Sage, president of said company, and the said
22 company then and there fraudulently and illegally converted said bonds to its own use, and refused, and have ever since refused, thought often requested by the defendant so to do, to return them to the said depositary or to the defendant.

10. That the said Minnesota Railway Construction Company had not on the 28th day of March, 1872, nor has it yet, complied with the said contract, nor had it then nor has it performed the acts which by its said contract made a condition precedent to the delivery of said bonds or coupons to it. That it had not on the 28th day of March, A. D. 1872, nor on the 24th day of April, 1873, in its own name or otherwise, built and equipped a good and substantial railway from the city of St. Paul to the city of Winona, (except a bridge across the Mississippi River at Hastings,) and put it into operation. Nor had it on the 28th day of March, 1872, nor on the 24th day of April, 1873, nor has it yet, in its own name or otherwise, built and equipped or caused to be built and equipped a railway from the city of St. Paul to the city Winona, (except a bridge across the Mississippi River at Hastings,) and connected said
23 railroad at Winona by a bridge or ferry with the La Crosse, Trempealeau and Prescott Railroad; and the defendant alleges that there was not at either of the dates last aforesaid nor has there yet been built, equipped, or put into operation from St. Paul to Winona, (except a bridge across the Mississippi River at Hastings,) a good and substantial railroad or any railroad connecting at Winona with the La Crosse, Trempealeau and Prescott Railroad.

11. That the plaintiff had actual notice and knowledge in fact of each and every matter, fact, and thing alleged in this answer except as to the incorporation and organization of defendant as and at the time the same was due, transpired, or occurred, and he well knew the terms of the said contract made by and between the defendant and said Minnesota Railway Construction Company, and the terms and conditions on which said bonds and coupons were deposited with and held by said Horace Thompson, and well knew, and has at all times since the making of said contract well known, that neither the said Min-
24 nesota Railway Construction Company nor any company or person on its behalf, or otherwise, had complied with the said contract, and well knew, and has at all times since the making of said contract well known, that neither said Minnesota Railway Construction Company nor any other company or person except the defendant was entitled or legally authorized to take or receive said bonds or said coupons from said depositary, and that the said depositary had no right or legal authority to deliver said bonds or coupons or any of them to any person except defendant, and plaintiff well knew when said bonds and coupons and each of them was obtained from the said depositary the same were illegally, wrongfully, and fraudulently obtained, and that the defendant was not legally liable thereon, and that said bonds were obtained from said depositary for the purpose of cheating and defrauding the defendant.

12. That the bonds and coupons referred to in the complaint herein are the same referred to in this answer and none other, and they were made as the conditions and for the consideration aforesaid, and

none other, and that the defendant never delivered or authorized the delivery thereof, except said Horace Thompson, to be held by him in trust as aforesaid, and the defendant has never received any consideration whatever therefor; all of which facts plaintiff well knew, and had actual notice and knowledge thereof at the time said bonds and coupons were delivered to and surrendered by said depositary as aforesaid.

13. That the plaintiff has never paid any consideration for any of said coupons.

14. That the plaintiff aided, abetted, encouraged, and advised each and all of the fraudulent and illegal acts alleged in this answer.

THOMAS WILSON,
Defts. Atty., Winona, Minnesota.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

Daniel Evans, being duly sworn, deposes and says he is an alderman of said City of Winona, defendant herein; that the above answer is true of his own knowledge, except as to matters therein stated upon his information and belief, and as to those matters he believes it to be true.

DANIEL EVANS.

Sworn & subscribed before me this 30th day of July, 1873.
[NOTARIAL SEAL.] THOMAS WILSON,
Notary Public Minnesota.

Schedule A, referred to in the foregoing answer.

Form of deed.

STATE OF MINNESOTA, CITY OF WINONA.

No. $1,000.

Know all men by these presents, that the city of Winona, in Winona County, State of Minnesota, is indebted to Russell Sage and others, of the city and State of New York, or bearer, in the sum of one thousand dollars, which they promise to pay to the bearer hereof, on the 1st day of January, 1891, in the city of New York, with interest thereon from the 1st day of January, 1871, at the rate of six per centum per annum, payable semi-annually at the Importers and Traders' National Bank, in the city of New York, on the first day of January and July in each year, on the presentation and surrender of the annexed coupons as they severally become due.

This bond is one of a series of like tenor and effect issued by the City of Winona to the amount of $100,000 to aid in the construction of a railroad from St. Paul to Winona.

In witness whereof the city of Winona has caused this bond to be sealed, signed, and delivered in their corporate name, by order of the city council of said city, pursuant to their resolutions in this respect passed , 1870.

[SEAL.] THE CITY OF WINONA,
By *Mayor.*

Attest: *City Recorder.*

The Minnesota Railway Construction Company hereby, on their part, the city of Winona keeping and performing its agreement as herein contained, agree:

First. To, either in their own name or that of their successors or as-

signs, or in the name of the St. Paul and Chicago Railway Company, build and equip a good and substantial railway from the city of St. Paul to the city of Winona, (excepting a bridge across the Mississippi River at Hastings,) and put it into operation within three years from this date, and to connect at Winona, by bridge or ferry, with the La Crosse, Trempe'leau and Prescott Railroad.

28 Second. That that part of said railway between a point on the Winona and St. Peter Railroad, at or near Minnesota City, in Winona County, and the village of Minneiska, in Wabasha County, shall be built, equipped, and put into operation within one year from this date.

Third. That the La Crosse, Trempe'leau and Prescott Railroad, from its terminus opposite Winona, as now located and fixed, (which terminus shall not be changed without the consent of the city of Winona,) to a point on the Milwaukee and St. Paul Railway east of North La Crosse, shall be built, equipped, and put into operation within the year 1870.

It is further agreed by and between the parties hereto that the said bonds are to be in form plain, unconditional obligations, and substantially of the form and tenor of Schedule A, hereto annexed, and are to be executed as soon as practicable, and placed in the custody of said depositary, to be delivered as hereinafter provided.

It is further agreed, as to the delivery of said bonds, as follows:

First. That if the said La Crosse, Trempe'leau and Prescott Railroad is not built, equipped, and put in operation as aforesaid, between

29 the points aforesaid, within the year 1870, then and in that event the said bonds and coupons shall be by said depositary returned to the city of Winona or to its legally-authorized agent.

Second. That if a railroad from a point on the Winona and St. Peter Railroad, at or near Minnesota City, in Winona County, to Minneiska, in Wabasha County, is not built, equipped, and put in operation as aforesaid within one year from this date, then and in that event said bonds and coupons should be by said depositary returned to said city of Winona or to its legally-authorized agent.

Third. That if a railroad is not built, equipped, and put into operation from St. Paul to Winona (except the bridge at Hastings) as aforesaid, connecting at Winona, by bridge or ferry, with the La Crosse, Trempe'leau & Prescott Railroad, within three years from this date, then and in that event the said bonds and coupons shall be by said depositary returned to said city of Winona or to its legally-authorized agent; but in no case shall the said bonds, or any part thereof, be delivered by said depositary to the said Minnesota Railway Construction Company until a truss railroad-bridge is constructed across the Mississippi

30 River at Winona, connecting the said St. Paul and Chicago Railway or the Winona and St. Peter Railroad with the La Crosse, Trempe'leau and Prescott Railroad at the present terminus of the last-named railroad; but if in each and every of the respects above mentioned the said railroads and the several parts of said railroads are built, equipped, and put into operation within the time and in the manner above agreed, and said railroad-bridge constructed as above provided, then and in that event only shall the said bonds be delivered to the said Minnesota Railway Construction Company by said depositary.

It is further agreed that while said bonds are legally held in custody or trust by said depositary as aforesaid, the interest-coupons as they mature and become due are to be delivered to the said Construction Company. It is further agreed that the City of Winona shall have no cause of action against the Minnesota Railroad Construction Company

by reason of the failure to build said lines of railroads or any part thereof.

In witness whereof the said City of Winona has authorized their
31 mayor to sign this instrument in their corporate name, and the city recorder to attest the same with his official signature and the seal of the city; and the board of directors of the Minnesota Railway Construction Company have authorized their president and secretary to sign, seal, and deliver the same in their corporate name.

[SEAL.] CITY OF WINONA,
By WILLIAM S. DREW, *Mayor.*

Attest: CHAS. F. SCHROTH,
City Recorder.

[SEAL.] MINNESOTA RAILWAY CONSTRUCTION COMPANY,
By RUSSELL SAGE, *President.*

Attest: JAMES N. MCKINLEY,
Assistant Secretary.

Exhibit A.

This agreement, made this 23d day of April, A. D. 1870, by and between the city of Winona, of the State of Minnesota, and the Minnesota Railway Construction Company, a corporation organized under the laws of the State of Minnesota, and now engaged in the construction of the St. Paul and Chicago Railway, witnesseth:

That whereas the building of a railroad from St. Paul to Winona is of great public utility and benefit and a public improvement
32 which it is believed would be particularly beneficial and advantageous to the city of Winona; and whereas, in view of the premises, and as inducement and part compensation to the Minnesota Railway Construction Company, the City of Winona is willing and proposes to issue and deliver to the said Construction Company its bonds to the nominal amount of one hundred thousand dollars, to aid in the building of said railroad from St. Paul to Winona, and for the purpose of thus securing a line of travel by railroad between the East and West through said city as aforesaid, the City of Winona, in consideration of the premises, hereby agrees, the Minnesota Railway Construction Company keeping and performing their agreement as herein set forth, to make, sign, seal, and deliver, for the use and benefit of the said Minnesota Railway Construction Company, its obligations or bonds in sums of one thousand dollars each, to the aggregate amount of one hundred thousand dollars, obligating the said city to pay the amounts specified therein to Russell Sage and others, of the city and State of New York, or to the bearer, in twenty years from the first day of January, A. D. 1871, viz, on the first day of January, A. D. 1891, in the city of
33 New York, with interest at the rate of six per centum per annum. The interest to be paid semi-annually, on the first day of January and July of each year, in the city of New York, and to deposit said bonds with the First National Bank of St. Paul, in the State of Minnesota, to be held by said depositary in escrow or in trust, to be delivered as hereinafter provided.

34 (Indorsed:) U. S. circuit court, dist. of Minnesota. N. A. Cowdrey vs. City of Winona. Answer filed July 31, 1873. H. E. Mann, clerk. Thomas Wilson, atty. for deft., Winona, Minn.

35 United States circuit court, district of Minnesota. Term minutes December term, A. D. 1873. December 10, 1873.

N. A. COWDRY
vs.
THE CITY OF WINONA.

This cause being reached on the calendar and coming on to be tried, the plaintiff appeared, by Harvey Officer and Chas. E. Flandrew, esquires, and the defendant by Thomas Wilson, esqr., whereupon a jury was called, and before the same were impannelled the court adjourned until Thursday morning, December 11, 1873.

DECEMBER 11, 1873.

N. A. COWDRY
vs.
THE CITY OF WINONA.

This cause coming on to be further heard, and a jury being called came, to wit, Adam Lybe, W. H. DeKay, A. R. Hall, Benjamin D. Pay, G. L. Denning, Daniel W. Evans, W. H. Scofield, M. L. Lockerby, Z. M. Lyon, Peter Mantor, J. A. McCloskey, Robert Eckfers, talesmen; who were duly impannelled and sworn. Harvey Officer, esqr., opens the case for the plaintiff. The plaintiff presents his documentary
36 proofs. H. M. Knox is sworn & examined as a witness for plaintiff. And here the plaintiff rests his case.

The case is opened on the part of the defendant by Thomas Wilson, esqr.

Horace Thompson is sworn and examined as a witness for defendant.

DECEMBER 12, 1873.

N. A. COWDRY
vs.
THE CITY OF WINONA.

This cause coming on for further hearing, the parties appeared, by their attorneys, and the jury heretofore impannelled and sworn herein, being called, came.

Wm. S. Drew is sworn & examined as a witness for defendant.
A. F. Hodgins " " " "
Edward Rice " " " "
John Fellows " " " "
H. W. Lamberton " " " "
Chas. F. Schroth " " " "
D. Adams " " " "
Yeomans " " " "

United States circuit court for the district of Minnesota. Term minutes December term, A. D. 1873. December 13th, 1873.

37 N. A. COWDRY
vs.
THE CITY OF WINONA.

This cause coming on to be further tried, the jury heretofore impannelled and sworn herein, being called, came.

E. S. Yeomans, being recalled, is further examined as a witness for defendant.

And here the defendant rests its case.

J. T. Dodge is sworn & examined as a witness for plaintiff.

D. C. Shepherd " " " "

And here the plaintiff rests.

Thomas Wilson, esqr., sums up for the defendant, pending which the court adjourned.

United States circuit court for the district of Minnesota. Term minutes December term, A. D. 1873. January 6, 1874.

N. A. COWDRY
vs.
THE CITY OF WINONA.

The parties appeared, by their attorneys, and the jury heretofore impannelled and sworn herein, being called, came.

Thomas Wilson, eqr., resumes his summing up for defendant.

38 United States circuit court for the district of Minnesota. Term minutes December term, A. D. 1873. January 7, 1874.

N. A. COWDRY
vs.
THE CITY OF WINONA.

This cause coming on to be further heard, the parties appeared, by their attorneys, and the jury heretofore impannelled and sworn herein, being called, came.

Thomas Wilson, esq., concludes summing up for defendant.

Chas. E. Flandrew, esq., sums up for the plaintiff.

Charge is given the jury by the court, and they retire, in charge of an officer duly sworn and qualified to attend them, to consider of their verdict.

United States circuit court for the district of Minnesota. Term minutes December term, A. D. 1873. January 8, 1874.

N. A. COWDRY
vs.
THE CITY OF WINONA.

The jury heretofore impannelled and sworn in this cause came into court and say they have not agreed, and that they cannot
39 agree, upon a verdict.

Whereupon it is ordered that jury be discharged from the further consideration of this case, and that the cause do stand continued until the next term of this court.

United States circuit court for the district of Minnesota, June term, A. D. 1874. Term minutes June 16, 1874.

N. A. COWDRY
vs.
THE CITY OF WINONA.

Hon. Samuel F. Miller, judge, sitting alone.

This cause being reached on the calendar and called, the parties ap-

peared by their attorneys, Harvey Officer & Charles E. Flandrew, esqs., for plaintiff, and Messrs. Wilson & Taylor for defendant, whereupon a jury, being called, came, to wit: L. M. Conkey, John Byers, John Estergreen, W. B. Spencer, J. T. Avery, James A. James, George W. Hooper, William S. Hughes, A. H. Rawson, J. P. Howe, William Webb, James Chalmers, who are duly impannelled and sworn.

The case is opened on the part of the plaintiff by Harvey Officer, esq. Henry M. Knox is sworn & examined as a witness for the plaintiff.

J. T. Dodge " " " "
R. B. Langdon " " " "
D. C. Shepherd " " " "
40 Edmund Rice " " " "

And here the plaintiff rests his case.

Whereupon the defendant moved to dismiss the action; which motion was argued and submitted and held under advisement.

United States circuit court for the district of Minnesota. Term minutes June term, 1874. June 17, 1874.

Before Hon. Samuel F. Miller, judge.

N. A. COWDRY
vs.
THE CITY OF WINONA.

This cause coming on to be further tried, the parties appeared, by their attorneys, and the jury heretofore impannelled and sworn therein, being called, came.

Motion to dismiss denied.

John Fellows is sworn & examined as a witness for defendant.

J. H. Stewart " " " "
L. R. Brooks " " " "

And here the defendant rests his case.

Charge is given the jury by the court, and they retire, in charge of an office duly sworn and qualified to attend them, and, on being returned into court they say they find a verdict for the plaintiff; and they assess his damages at the sum of twelve thousand five hundred and two dollars and seventy-two cents.

41 United States circuit court for the district of Minnesota. Term minutes June term, A. D. 1874. June 19, 1874.

N. A. COWDRY
vs.
THE CITY OF WINONA.

This cause having been tried before a jury on the 17th day of June, A. D. 1874, returned a verdict for the plaintiff and assessed his damages at the sum of twelve thousand five hundred and two dollars and seventy-two cents, and the interest on said verdict to date being the sum of four dollars and ninety-six cents. Now, upon motion of plaintiff, it is by the court considered, ordered, and adjudged that the plaintiff do have and recover of and from the defendant the sum of twelve thousand five hundred and seven dollars and sixty-eight cents, his damages and interest aforesaid, besides his costs and charges by him in

and about his suit in this behalf expended, to be taxed, and that the plaintiff have execution therefor.

D. 1257.68. Judgment-record signed this 19th day of June, A. D. 1874.

H. E. MANN, *Clerk.*

42 (Indorsed:) U. S. circuit court, dist. of Minnesota. N. A. Cowdry vs. The City of Winona. Judgment-roll. Filed July 3d, 1874. H. E. Mann, clerk.

43 In the circuit court of the United States for the district of Minnesota.

N. A. COWDRY
vs.
THE CITY OF WINONA.

Be it remembered that at the general term of said court held in the city of St. Paul, in said district, on the 15th day of June, A. D. 1874, the above-entitled action was brought on for trial on the issues joined by the pleadings therein before the honorable Samuel F. Miller, a judge of the said court, and a lawful jury duly impannelled and sworn to try the said issues. And the plaintiff and defendant then and there appeared, by their respective counsel. It was thereupon admitted in open court by the counsel of the respective parties, that the coupons on which this suit was brought are part of those referred to in the contract attached to and made a part of the answer in this action, (referred to in said answer as Exhibit A,) which said contract was then and there introduced and read in evidence, and is in the words and figures following:

Exhibit A.

44 "This agreement, made this twenty-third day of April, 1870, by and between the City of Winona, of the State of Minnesota, and the Minnesota Railway Construction Company, a corporation organized under the laws of the State of Minnesota, and now engaged in the construction of the St. Paul and Chicago Railway, witnesseth:

"That whereas the building of a railroad from St. Paul to Winona is of great public utility and benefit and a public improvement, which it is believed would be particularly beneficial and advantageous to the city of Winona; and whereas said St. Paul and Chicago Railway will connect, by bridge or ferry, at Winona with the La Crosse, Trempe'leau and Prescott Railroad now being constructed, and will, when both railroads are completed, open and furnish an unbroken line of travel by railroads, through Winona, between St. Paul and Milwaukee and Chicago, which also is considered especially beneficial and advantageous to the city of Winona; and whereas, in view of the premises, and as an inducement and part compensation to the Minnesota Railway Construction Company, the City of Winona is willing and proposes
45 to issue and deliver to the said Construction Company its bonds to the nominal amount of one hundred thousand dollars, to aid in the building of said railroad from St. Paul to Winona, and for the purpose of thus securing a line of travel by railroad between the East and the West through said city as aforesaid, the City of Winona, in con-

sideration of the premises, hereby agrees, the Minnesota Railway Construction Company keeping and performing their agreement as herein set forth, to make, sign, seal, and deliver for the use and benefit of the said Minnesota Railway Construction Company, its obligations or bonds in sums of one thousand dollars each, to the aggregate amount of one hundred thousand dollars, obligating the said city to pay the amount specified therein to Russell Sage and others, of the city and State of New York, or to the bearer, in twenty years from the first day of January, A. D. 1871, viz, on the first day of January, A. D. 1891, in the city of New York, with interest at the rate of six per cent. per annum. The interest to be paid semi-annually, on the first day of January and July of each year, in the city of New York, and to deposit said
46 bonds with the First National Bank of St. Paul, in the State of Minnesota, to be held by said depositary in escrow or in trust, to be delivered as hereinafter provided.

"The Minnesota Railway Construction Company hereby, on their part, the City of Winona keeping and performing its agreement as herein contained, agree:

"First. To either in their own name or that of their successors or assigns, or in the name of the St. Paul and Chicago Railway Company, build and equip a good and substantial railway from the city of St. Paul to the city of Winona, (excepting a bridge across the Mississippi River, at Hastings,) and put it into operation within three years from this date, and to connect at Winona, by bridge or ferry, with the La Crosse, Trempe'leau and Prescott Railroad.

"Second. That said part of said railway between a point on the Winona and St. Peter Railroad at or near Minnesota City, in Winona County, and the village of Minneiska, in Wabasha County, shall be built, equipped, and put into operation within one year from this date.

"Third. That the La Crosse, Trempe'leau and Prescott Railroad from its terminus opposite Winona as now located and fixed, (which
47 terminus shall not be changed without the consent of the City of Winona,) to a point on the Milwaukee and St. Paul Railway east of North La Crosse, shall be built, equipped, and put into operation within the year 1870.

"It is further agreed by and between the parties hereto, that the said bonds are to be, in form, plain unconditional obligations, and substantially of the form and tenor of Schedule A hereto annexed, and are to be executed as soon as practicable, and placed in the custody of said depositary, to be delivered as hereinafter provided.

"It is further agreed as to the delivery of said bonds as follows:

"First. That if the said La Crosse, Trempe'leau & Prescott Railroad is not built, equipped, and put into operation as aforesaid, between the points aforesaid, within the year 1870, then, and in that event, the said bonds and coupons shall be by said depositary returned to the City of Winona or to its legally-authorized agent.

"Second. That if a railroad from a point on the Winona & St. Peter Railroad at or near Minnesota City, in Winona County, to Minneiska, in Wabasha County, is not built, equipped, and put into opera-
48 tion as aforesaid within one year from this date, then and in that event said bonds & coupons shall be by said depositary returned to said City of Winona or its legally-authorized agent.

"Third. That if a railroad is not built, equipped, and put into operation from St. Paul to Winona (except the bridge at Hastings) as aforesaid, connecting at Winona, by bridge or ferry, with the La Crosse, Trempe'leau and Prescott Railroad within three years from this date, then

and in that event the said bonds and coupons shall be by said depositary returned to said City of Winona or to its legally-authorized agent; but in no case shall the said bonds or any part thereof be delivered by said depositary to the said Minnesota Railway Construction Company until a truss railroad-bridge is constructed across the Mississippi River at Winona, connecting the said St. Paul & Chicago Railway, or the Winona & St. Peter Railroad with the La Crosse, Trempeleau & Prescott Railroad at the present terminus of the last-named railroad. But if in each and every of the respects above mentioned the said railroads and the several parts of said railroads are built, equipped,
49 and put into operation within the times and in the manner above agreed, and said railroad-bridge constructed as above provided, then and that event, and in that event only, shall the said bonds be delivered to said Minnesota Railway Construction Company by said depositary.

"It is further agreed that while said bonds are legally held in custody or trust by said depositary as aforesaid, the interest-coupons as they mature and become due are to be delivered to the said Construction Company.

"It is further agreed that the City of Winona shall have no cause of action against the Minnesota Railway Construction Company by reason of the failure to build said lines of railroads or any part thereof.

"In witness whereof the said City of Winona has authorized their mayor to sign this instrument in their corporate name, and the city recorder to attest the same with his official signature and the seal of the city, and the board of directors of the Minnesota Railway Construction Company have authorized their president and secretary to sign, seal, and deliver the same in their corporate name.

"CITY OF WINONA,
50 [SEAL.] "By WM. S. DREW, *Mayor.*

"Attest:

"CHAS. F. SCHROTH,
"*City Recorder.*

"MINNESOTA RAILWAY CONSTRUCTION COMPANY,
[SEAL.] "By RUSSELL SAGE,
"*President.*

"Attest:

"JAMES M. MCKINLEY,
"*Assistant Secretary.*"

[5-cts. int. rev. stamp.]

It was also then and there admitted in open court by the counsel for the respective parties that the said contract (Exhibit A) was executed by the defendant and the Minnesota Railway Construction Company therein named and referred to, and that the said bonds in said contract referred to, and the coupons thereto attached, were deposited in trust or in escrow as in said contract provided, and were to be delivered as in said contract provided and not otherwise, and that the City of Winona did not otherwise deliver or authorize the delivery of the said bonds or the said coupons, or any of them, and the said bonds and the said coupons were delivered by the said depositary to the said Minnesota Railway Construction Company after one-half of the coupons in suit (in number and value) had matured or become due, and before the
51 other half thereof had matured or become due. It was also admitted that the plaintiff did not receive the coupons sued upon

or any of them, until after their maturity. The said plaintiff then gave in evidence the coupons described in the complaint, and the amount due thereon was admitted to be the sum stated in the verdict of the jury, which said coupons are the first four falling due upon ninety of the bonds described in the contract, Exhibit A.

And the plaintiff thereupon offered and introduced before said court and jury evidence tending to show and prove that the said contract had been performed and complied with in all respects by the said Minnesota Railway Construction Company, and that he was before the commencement of this action and is the owner of the coupons sued upon; and rested. And the defendant then and there offered and introduced evidence before the said court and jury tending to show and prove that the said Minnesota Railway Construction Company did not, either in its own name or in the name of its successors or assigns, or in the name
52 of the St. Paul and Chicago Railway Company, equip or put into operation said railroad, or any railroad from St. Paul to Winona, or any part thereof, or connect said railroad from St. Paul to Winona, or any railroad, by bridge or ferry, with the La Crosse, Trempe'leau and Prescott Railroad; that the said line of railroad from St. Paul to Winona was built by the Minnesota Railway Construction Company for the St. Paul and Chicago Railway Company, under a contract between the two last-named companies, which is marked "Exhibit B," and is in the words and figures following, viz:

Exhibit B.

"This agreement, made this 29th day of June, 1869, by and between the St. Paul and Chicago Railway Company, party of the first part, and the Minnesota Railway Construction Company, party of the second part, both of said parties being corporations and legally incorporated under the laws of the State of Minnesota, witnesseth:

"That whereas the said St. Paul and Chicago Railway Company is desirous of securing the construction and equipment of its line of
53 railway to connect the cities of St. Paul and Winona: Now, therefore, in consideration of the premises and of the undertakings and promises of the said St. Paul and Chicago Railway Company herein set forth, the Minnesota Railway Construction Company hereby agrees to obtain the necessary right of way and to build and equip said railway according to the directions and in the manner and time which shall be prescribed by said railway company, so that the same when completed shall, upon the average, in every way equal in its construction and equipment the first division of the St. Paul & Pacific Railroad extending from St. Paul to Sauk Rapids.

"The said St. Paul & Chicago Railway Company, in consideration of the premises and of the undertakings of the said Minnesota Railway Construction Company, hereby agrees to sell, transfer, and assign, and by these presents does hereby sell, transfer, and assign to said Minnesota Railway Construction Company, for building and equipping said railway as aforesaid, as follows, viz:

"First. $3,000,000 of the first-mortgage land-grant bonds of the St. Paul & Chicago Railway Company, secured by a mortgage or deed
54 of trust to the Farmers' Loan and Trust Company of the city of New York dated February 1st, 1868, or an equivalent amount of similar first-mortgage bonds to be secured either by a new first mortgage on the same premises or by a supplement or amendment of the present mortgage to said Trust Company.

"Second. $3,000,000 of special preferred capital stock of the St. Paul & Chicago Railway Company, which special preferred capital stock is to be limited to $3,000,000 in amount, and is to be created and issued under and in pursuance of an act of the State of Minnesota entitled "An act to amend the charter of the St. Paul and Pacific Railroad Company," approved Feb'y 6th, 1864, also an act to amend certain laws relating to the St. Paul & Chicago Railway Company approved March 4th, 1868, and also any other laws of the State relating to this subject, and shall give the holders thereof a preference from said railway company of ten per cen tum per annum from the net earnings of said railway and an absolute separate ownership of all the lands which have been or which shall be hereafter granted to or acquired by said railway company in
55 aid of the construction of said railway either by or from the United States or by or from the State of Minnesota or by or from any municipality or corporation or individual whatever excepting lands used or necessary for right of way, gravel-pits, and depot purposes.

"Third. All their right, title, and interest in and to any and all of the present capital stock of six million of dollars of such St. Paul & Chicago Railway Company now outstanding, however the same may have been issued, whether hypothecated or held in trust or for any other purpose whatever.

"Fourth. All gifts, donations, bounties, or aids in any form or shape which have been or may hereafter be made or given by any person, corporation, municipality, or State to aid in the construction of said railway.

"It is mutually agreed that the road shall be built according to the directions and in the manner and time which shall be prescribed by said railway company. And that the Construction Company are to be paid and are to receive all their payments for the construction in ad-
56 vance, and that they are to assume the contracts heretofore made with Reynolds, Saulspaugh and Company and Charles A. F. Morris, under which the road has been partly graded, and is to be completed ready for superstructure from St. Paul to a point near Hastings, a distance of about twenty miles.

"Fifth. The St. Paul & Chicago Railway Company hereby agrees to make and deliver to the Minnesota Railway Construction Company any and all further documents or instruments in writing which the Minnesota Railway Construction Company shall require, or be advised by counsel as necessary or important to them that they should have, to more effectually carry out the true intent and meaning of this agreement.

"In witness whereof the parties hereto have caused this agreement to be signed in their name and on their behalf by their respective presidents or vice-presidents and secretaries or assistant secretaries on the day and year first above named.

"THE SAINT PAUL & CHICAGO RAILWAY COMPANY,
"By EDMUND RICE,
"*President.*
"JOHN M. BURKE,
"*Assistant Secretary.*

[U. S. int. rev. stamp 55.]
[St. Paul and Chicago Railway Company seal.]

"MINNESOTA RAILWAY CONSTRUCTION COMPANY,
"By RUSSELL SAGE, *President.*
"JAMES M. McKINLEY,
57 "*Asst. Secy.*"

The defendant also then and there offered and introduced evidence tending to prove that neither the Minnesota Railway Construction, its successors, or assigns, nor the St. Paul & Chicago Railway Company, built or constructed, or caused to be built or constructed, any bridge, or put on or caused to be put on or kept any ferry, across the Mississippi River at Winona connecting said railroad.

Defendant also then and there offered evidence tending to prove that that section or part of said line of railroad from St. Paul to Winona which lies between a point on the Winona & St. Peter Railroad at Minnesota City, in Winona County, and Weaver, in Wabasha County, was equipped and put into operation by the Winona & St. Peter Railroad Company under and in pursuance of a contract between said last-named company and the St. Paul and Chicago Railway Company, which is in the following words and figures, and marked "Exhibit C."

Exhibit C.

58 "This agreement, made this thirtieth day of November, A. D. 1870, between the St. Paul and Chicago Railway Company, of the first part, and the Winona and St. Peter Railroad Company, of the second part, witnesseth:

"The said party of the first part, for and in consideration of the covenants and agreements hereinafter contained on the part of the said party of the second part, doth hereby covenant and agree, to and with the said party of the second part, to complete its road from the junction switch near Minnesota City to Weaver, on the north bank of the Whitewater River, a distance of about 13½ miles, and ballast and surface the track in good running order, and protect all banks liable to wash, with brush or stone, and build such snow-fences as may be required to prevent drifting of snow, as soon as practicable, and as soon as so completed to lease the same to the party of the second part for the time which shall elapse before the completion of the track of the road of the party of the first part from Red Wing to Weaver, and such completion of the track is to terminate said lease and this agreement.

59 "And the said party of the first part further agrees to repair promptly and at its own expense any and all extraordinary damages of wash by floods, settling of embankments, and other repairs of the road-bed, bridges, and culverts, due to imperfect construction of the same. All ordinary repairs, however, it is understood, are to be paid for by said party of the second part.

"The said party of the second part agrees to lease from the said party of the first part the road aforesaid for the time aforesaid, and agrees to pay, and the party of the first part agrees to receive, as rental for the use of said road, twenty per centum of the gross receipts thereof from all sources; and said party of the second part further agrees to maintain said road, track, building, and all appurtenances in good repair during its use of the same, ordinary wear excepted, and to operate the same by running at least one regular train each way daily, Sundays excepted.

"The rental above provided for is to be paid quarterly, on the first days of January, April, July, and October, or as soon thereafter as receipts can be made up. In making up such gross receipts on all

60 business between points on said road and Winona, a pro rata division on the basis of mileage shall be made on all local business between Minnesota City and Winona; local rates shall be charged, and local rates shall also be charged on all business of said road from or to points on the Winona & St. Peter Railroad west of Minnesota City.

"The party of the second part shall regulate the tariff-rates of transportation on the road hereby leased, but such rates shall not be less, at

any time, than are charged for corresponding distances on the Winona & St. Peter Railroad, except by the written consent of the first party, and no rebates or drawbacks upon the fixed rates for transportation shall be paid by said second party without the consent of said first party in writing. The said party of the second part further agrees to indemnify and save harmless said party of the first part of and from all liability as a common carrier on the line of said road hereby leased during the continuance of this lease. The party of the first part shall have the right at any and all times to enter upon the track of said road with its engines, cars, and men, for the purpose of construction and
61 repairs, without charge and subject only to all needful and proper time-tables, regulations, as said second party may adopt. Materials for construction shall be carried over said road by said second party for said party of the first part or the contractors at net cost.

"In witness whereof the said parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries, and their respective corporate seals to be attached hereto, the day and year first above written.

"THE ST. PAUL & CHICAGO RAILWAY COMPANY,

[SEAL.] "By EDMUND RICE, *President.*

"JOHN M. BURK,

"*Asst. Secty.*

"THE WINONA & ST. PETER RAILROAD COMPANY,

[SEAL.] "By *President.*"

In presence of—

The words "due to imperfect construction of the same," on second page, interlined before execution.

But there was evidence tending to prove that said contract was made with the assent and approval of the said Construction Company; but there was a conflict of testimony on this point.

62 Defendant, then and there, also offered evidence tending to show that the said Winona & St. Peter Railroad Company first equipped and commenced to operate that part of the said railroad between the points last aforesaid (Weaver & Minnesota City) after November 30, 1870, and continued to exclusively operate the same between eight and nine months; and that that section or part of said line of railroad between said last-named two points included all that part of said railroad between Minnesota City, in Winona County, and the village of Minneiska, in Wabasha County; and that the other parts or sections of said railroad, from St. Paul to Winona, were, as the several sections were completed, equipped and put into operation by the Milwaukee & St. Paul Railway Company, under and in pursuance of contracts made by and between the last-mentioned company and the St. Paul & Chicago Railway Company, which said contracts were in all respects, except as to the parties thereto and the parts of the road to be equipped and operated, substantially the same as the contract made by the St.
63 Paul & Chicago Railway Company with the Winona & St. Peter Railway Company, above set out and referred to as Exhibit C; that the said railroad from St. Paul to Winona is called and known as the St. Paul & Chicago Railway.

Defendant also offered evidence tending to prove that, after making the connection with the Winona & St. Peter Railroad inside of the city of Winona, as hereinafter stated, the line of the St. Paul & Chicago Railway, from a point about nine hundred feet west of the city of Winona, was produced and extended in a southerly direction, and is and

was in 1872 built past the said city of Winona to La Crescent, opposite the city of La Crosse, leaving the city of Winona between the line of the railroad and the Mississippi River. That the St. Paul & Chicago Railway connects with the track of the Winona & St. Peter Railroad, as aforesaid, at a point about fifty feet inside and east of the western boundary of the said city of Winona, which point of connection or joining of the said tracks of said last named two railroads is 8,571 feet west of the western end of the railroad-bridge across the Mississippi
64 River at Winona, whose east end connects or joins with the La Crosse, Trempe'leau & Prescott Railroad at its terminus opposite said city of Winona, as the said terminus was located and fixed in April, 1870, and that said railroad from St. Paul to Winona has not been built nearer to the west bank of the Mississippi River at Winona, or to the western end of any railroad-bridge, or the western landing of any ferry which has connected with the La Crosse, Trempe'leau & Prescott Railroad, than 8,571 feet, as aforesaid, or nearer than 6,600 feet to the approaches to such bridge or ferry.

That the Winona & St. Peter Railroad connects with the truss railroad-bridge across the Mississippi River at Winona, and that said railroad-bridge at Winona was built and is owned by the Chicago & Northwestern Railway Company, and that the last-named railway company has for the past seven years exclusively owned and operated the said Winona & St. Peter Railroad. And that the St. Paul & Chicago Railroad does not connect with the La Crosse, Trempe'leau & Prescott
65 Railroad by bridge or ferry, or otherwise, save by the connection with the said Winona & St. Peter Railroad at the point aforesaid, 8,571 feet west of the west end of the railroad-bridge.

The defendant also offered evidence tending to prove that when the said contract between the defendant and the said Minnesota Railway Construction Company (Exhibit A) was entered into, the said St. Paul & Chicago Railway was built to Hastings, about twenty miles below St. Paul, and graded part of the way between Hastings and Red Wing, and that the contract for the building and equipping of the said St. Paul & Chicago Railroad (Exhibit B) was made and entered into in June, 1869. And that the St. Paul & Chicago Railway Company on the third day of January, A. D. 1872, sold to the Milwaukee & St. Paul Railway Company its line of railroad from St. Paul to Winona and the cars and locomotives mentioned in the deed or contract of sale, and that the deed or contract of sale was in writing, and is in the following words and figures, (marked "Exhibit D.")

"*Exhibit D.*

66 ST. PAUL AND CHICAGO RAILWAY CO. }
to
MILWAUKEE & ST. PAUL RAILWAY CO. }

"This indenture, made the third day of January, in the year of our Lord one thousand eight hundred and seventy two, between the St. Paul & Chicago Railway Company, a corporation organized under the laws of the State of Minnesota, of the first part, and the Milwaukee & St. Paul Railway Company, a corporation under the laws of the State of Wisconsin, of the second part, witnesseth:

"The St. Paul & Chicago Railway Company, party of the first part, in consideration of the sum of four million dollars to it paid by the Milwaukee and St. Paul Railway Company, party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, aliened, enfeoffed, and confirmed, and hereby grants,

bargains, sells, remises, releases, aliens, enfeoffs, and confirms to the Milwaukee & St. Paul Railway Company, party of the second part, its successors and assigns, forever, the line of railroad of the
67 party of the first part, commencing at its terminus in the city of St. Paul, thence in a southerly direction on the east bank of the Mississippi River through the counties of Ramsey and Washington to a point opposite or nearly opposite to the city of Hastings; thence across the Mississippi by draw-bridge or viaduct to Hastings; thence on the west bank of the Mississippi River in a southerly direction through the counties of Dakota, Goodhue, Wabasha, Winona, and Houston to La Crescent, including said iron bridge at Hastings, all in the State of Minnesota, with all lands and real estate used for railroad purposes, at and between the points above named, and all rails, fixtures, stations, depots, warehouses, shops, water-tanks, turn-tables, machinery, and apparatus connected therewith and appurtenant thereto, including fifteen first-class locomotive engines, one hundred box-cars, and thirty-five flat-cars, and all the rights and franchises of every description of the party of the first part appertaining to the said line of railway from St. Paul to La Crescent necessary or requisite to the operation of the same,
68 reserving herefrom all lands not used for railway purposes, owned or to be owned by the grant or donated by the United States of America or by the State of Minnesota:

"To have and to hold the said granted property, with the appurtenances, to the party of the second part, its successors and assigns, to its and their sole use, benefit, and behoof forever.

"And the St. Paul & Chicago Railway Company covenants to and with the Milwaukee & St. Paul Railway Company, its successors and assigns, that it will forever warrant and defend the Milwaukee & St. Paul Railway Company, its successors and assigns, against all person or persons lawfully claiming or to claim the same or any part thereof.

"And the St. Paul & Chicago Railway Company further covenants to and with the Milwaukee & St. Paul Railroad Company, its successors and assigns, that it will at any and all times upon the request of the Milwaukee & St. Paul Railway Company, or its successors or assigns, execute and deliver to the Milwaukee & St. Paul Railway Company, its successors or assigns, any and all such further deeds, conveyances, releases, or other instruments which, in the opinion of its counsel
69 learned in the law, may be deemed necessary or proper to vest in the Milwaukee & St. Paul Railway Company, its successors or assigns, the title to all or to any part of the real or personal property and rights and franchises above herein conveyed, or intended so to be, so that they may at any and at all times hold them by an absolute and perfect title.

"In witness whereof the St. Paul & Chicago Railway Company hath caused its name and common seal and the signature of its vice-president and assistant secretary to be hereto affixed, the day and year first above written.

"THE ST. PAUL & CHICAGO RAILWAY COMPANY.
[OFFICIAL SEAL.] "By RUSSELL SAGE,
"*Vice-President.*

"Attest: L. BOARDMAN,
"*Assistant Secretary.*

"Signed & delivered in presence of—
"J. M. PARKER,
"JAMES M. MCKINLAY."

[Int. rev. stp., $4,000.00.]

STATE OF NEW YORK,
City and County of New York, ss:

On this twenty-third day of January, 1872, before me, the subscriber, a commissioner in and for the said State, appointed by the gov-
70 ernor of the State of Minnesota, to take the acknowledgment and proof of the execution of deeds and other instruments in writing, to be used or received in the said State of Minnesota, personally appeared Russell Sage and Landsdale Boardman, known to me to be the same persons who executed the above deed, for and in the name of the St. Paul and Chicago Railway Company, and known to me to be respectively the vice-president and assistant secretary of said company, and they acknowledged to me that they voluntarily executed the same as the free act and deed of the St. Paul and Chicago Railway Company, for the purposes therein specified.

Witness my hand and official seal the day and year aforesaid.

[COMMISSIONER'S SEAL.] JAMES M. McKINLEY,
Commissioner of Deeds, &c., for Minnesota.

Filed February 10, A. D. 1872, at 3 o'clock p. m.

The defendant also offered evidence tending to prove that neither the Minnesota Railway Construction Company nor the St. Paul & Chicago Railway Company has ever been authorized or allowed to run or
71 send cars or trains over any part of the Winona & St. Peter Railroad, between Minnesota City (which is four miles west of Winona) and the said railroad-bridge across the Mississippi River at Winona, except that at two or three times by special permission of the superintendent of the Winona & St. Peter Railroad the Minnesota Railway Construction Company was permitted to run a train of construction cars between the points last aforesaid, loaded with materials to aid in the construction of the St. Paul & Chicago Railway; but there was also evidence tending to show that the said parts of said road was being operated by the Milwaukee & St. Paul Railroad Company during that time.

The defendant then called and offered as a witness J. T. Dodge, by whom it offered to prove that at the time the contract was made by and between the defendant and the Minnesota Railway Construction Company, (Exhibit A,) the Milwaukee & St. Paul Railway Company had a railroad running into the city of La Crosse from the east, and that La Crosse is on the east bank of the Mississippi River, twenty-eight miles below Winona; to which the plaintiff objected as incompetent,
72 irrelevant, and immaterial, and the court sustained the objection, and the defendant excepted to such ruling.

The defendant also offered to prove by this witness that, in the year of 1872, the St. Paul & Chicago Railway was built past Winona, on the west bank of the Mississippi River, to a point opposite La Crosse, (La Crescent;) to which the counsel for the plaintiff objected as incompetent, irrelevant, and immaterial, and the court sustained the objection, and the defendant excepted.

The defendant also offered to prove by this witness that neither the Minnesota Railway Construction Company nor the St. Paul & Chicago Railway Company obtained or attempted the right of way over, or title to, the land on which the track of the St. Paul & Chicago Railway is laid at its point of connection with the Winona & St. Peter Railroad, as aforesaid, for 900 feet west therefrom; to which the plaintiff objected as incompetent and immaterial, and the court sustained the objection, and the defendant then and there excepted.

Defendant also offered to prove by this witness that the build-
73 ing of a line of railway from the point of intersection and connection of the St. Paul & Chicago Railway with the Winona & St. Peter Railroad, as aforesaid, (8,571 feet west of the bridge at Winona,) would have been very expensive, and the right of way therefor very expensive; to which the plaintiff objected as incompetent, irrelevant, and immaterial, and the court sustained the objection, and the defendant excepted to such ruling.

D. C. Shepard having been called as a witness, defendant offered to prove by him that the bluffs along the Mississippi River from Hastings to Winona are five hundred feet high, and approach so close to Winona that a line of railroad could not be built down the valley of the Mississippi River on the west bank, past Winona, without coming to Winona; to which the plaintiff objected as incompetent, irrelevant, and immaterial, and the court sustained the objection, and the defendant excepted to such ruling.

James H. Stewart, having been sworn as a witness, testified that he had been the general superintendent of the Winona & St. Peter Rail-
road for the last seven years. Defendant thereupon offered to
74 prove by the said last witness that the Chicago and Northwestern Railway Company built the truss railroad-bridge at Winona, and that the La Crosse, Trempleau & Prescott Railroad was built by the La Crosse, Trempleau & Prescott Railroad Company; to which the plaintiff objected as incompetent, irrelevant, and immaterial, and the court sustained the objection, and the defendant excepted to such ruling.

The defendant also offered to prove by this witness that at no period during the time that he was the general superintendent of the said Winona & St. Peter Railroad (seven years past) had any company or person other than the Winona & St. Peter Railroad Company any right to run cars over the track of the Winona & St. Peter Railroad between the west end of the said railroad-bridge at Winona and Minnesota City, (5 miles west of Winona,) except the Milwaukee & St. Paul Railway Company, and during the last winter the Green Bay & Minnesota Railroad Company; which was objected to by the plaintiff's counsel as irrelevant and incompetent, and the court sustained the objection, and the defend-
ant duly excepted.

75 The defendant then offered to prove by this witness that the railroad from St. Paul to Winona was built under a contract (before set out in this bill of exceptions, Exhibit B) between the St. Paul & Chicago Railway Company and the Minnesota Railway Construction Company, and at the time and in the manner specified by that company, (St. Paul & Chicago,) and in that contract, and as, and at the times, and in the manner directed by the said St. Paul and Chicago Railway Company, and that the said bonds and coupons were obtained by the said Minnesota Railway Construction Company from the depositary surreptitiously and by the connivance of the depositary, and without the knowledge or consent of the city of Winona; to which the plaintiff's counsel objected as incompetent, irrelevant, and immaterial, and the court sustained the objection, and the defendant's counsel excepted to such ruling.

There was no evidence further than that above set out tending to show that either the St. Paul & Chicago Railway Company, or the Mil-
waukee & St. Paul Railway Company, or the Winona & St. Peter
76 Railroad Company, has been or is the successors or "assigns" of the Minnesota Railway Construction Company, or that, save as set out in this bill of exceptions, the Minnesota Railway Construction

Company has or has had any successors or "assigns," or that it is not still in existence.

The evidence having been closed, the court instructed and charged the jury as follows, viz:

1. That the Milwaukee and St. Paul Railway Company having purchased the St. Paul and Chicago Railway, (as appears by Exhibit D, set out above,) it is the successor of the Minnesota Railway Construction Company within the meaning of the said contract between the defendant and the said Minnesota Railway Construction Company, (Exhibit A,) and the equipping and putting into operation of the said railroad by the said Milwaukee and St. Paul Railway Company was a compliance with and a performance of the said contract to equip and put into operation said road by the Minnesota Railway Construction
77 Company, its successors or assigns; to which charge and ruling the defendant then and there duly excepted.

2. The court also charged that it appearing that the Winona and St. Peter Railroad Company equipped and put into operation the railroad from Weaver to Minnesota City under the contract with the St. Paul & Chicago Railway Company, (marked "Exhibit C" in the bill of exceptions,) that was a compliance with the contract by the Construction Company as to equipping and putting into operation that part of the said railroad; to which ruling and charge the defendant then and there duly excepted.

3. The court also further instructed the jury that if the said railroad from St. Paul to Winona was equipped and put into operation by the St. Paul & Chicago Railway Company, or by the Minnesota Railway Construction Company or by the assigns of either, that was a sufficient compliance with the said contract (Exhibit A) as to the equipping and put-
ing into operation of the said railroad; to which ruling and charge
78 the defendant then and there excepted.

4. The court also further instructed the jury as follows: That if said railroad from St. Paul to Winona was built to any point within the city limits of Winona, and there connected with the track of the Winona & St. Peter Railway and the track of the last-named railroad connected with the railroad-bridge across the Mississippi River at Winona, which bridge connected with the La Crosse, Trempe'leau, and Prescott Railroad at the point named in Exhibit A; that this was within the meaning of the said contract, Exhibit A, a connecting of the said railroad from St. Paul to Winona by bridge or ferry with the La Crosse, Trempe'leau, & Prescott Railroad, if, after the purchase of the St. Paul & Chicago Railroad by the Milwaukee & St. Paul Railway Company, the last-named company continued to run its cars over the said railroad-bridge and over the Winona & St. Peter Railroad 8,571 feet west of said bridge; to which ruling the defendant then & there excepted.

79 The defendant then & there requested the court to give as a charge to the jury the following propositions, viz:

1. The equipping or putting into operation of said railroad from St. Paul to Winona, or any part thereof, by the Milwaukee & St. Paul Railway Company would not, and did not, operate as a performance by the Minnesota Railway Construction Company, unless it was done by the said Milwaukee and St. Paul Railway Company as the agent of or for the said Minnesota Railway Construction Company; which charge or instruction the court then and there refused to give or allow, and the defendant then and there duly excepted to such refusal and ruling.

2. That the building of a railway from St. Paul to the western limits of the city of Winona, and there connecting with the Winona and St.

Peter Railway at a point between one and two miles west of the west end of the railroad-bridge (or landing of the ferry) connecting the Winona & St. Peter Railroad with the La Crosse, Trempe'leau, and Prescott Railroad, was not a compliance with the said contract
80 with the said City of Winona, and was not a connecting of the said railway from St. Paul to Winona by bridge or ferry with the La Crosse, Tremp'leau and Prescott Railroad within the meaning or purview of the said contract; which charge or instruction the court then and there refused to give or allow; and the defendant then and there duly excepted to such refusal or ruling.

3. That it was incumbent on the said Construction Company in order to comply with said contract with the city of Winona not only to construct a railway from St. Paul to Winona, but to connect said railway by bridge or ferry with the La Crosse, Trempe'leau & Prescott Railroad without the intervention or use of any part of any other railway in making said connection; which charge or instruction the court then and there refused to give or allow, and the defendant then and there duly excepted to such refusal or ruling.

4. It was incumbent on the Minnesota Railway Construction Company, (in order to comply with its said contract with the city of Winona,)
81 either in its own name, or in the name of its successors or assigns, or in the name of the St. Paul & Chicago Railway Company, to build, equip, and put into operation a railroad from St. Paul to Winona, and to connect it by bridge or ferry with the La Cross', Trem'pleau & Prescott Railroad, and the doing of these acts, or any of them, by any other company or person, except as the agent of or for the said Minnesota Railway Construction Company, would not operate as a performance on its part of said contract; which charge or instruction the court then and there refused to give or allow; and the defendant then and there duly excepted to such refusal or ruling.

5. That if the consideration of the bonds and coupons and of defendant's contract with the said Construction Company was the promise of the said Construction Company, to do or its actually doing, something to do which it was previously bound under its contract with the St. Paul & Chicago Railway Company, that was not in the eye of the law a consideration to support the contract; which charge or instruction the
82 court then and there refused to give or allow, and the defendant then and there duly excepted to such refusal or ruling.

And the said jury, having retired to consider of their verdict, afterwards, on the same day, returned into court and delivered their verdict in the following words and figures following, to wit:

"We, the jurors in the case of Cowdry vs. The City of Winona, find a verdict for the plaintiff in the sum of twelve thousand five hundred and two dollars and seventy-seven cents, ($12,502.77.)

"A. H. RAWSON,
Foreman.

"ST. PAUL, *June* 17, 1874."

And the court then and there rendered judgment upon the said verdict in favor of the plaintiff, and against the defendant, for the sum of twelve thousand five hundred and two $\frac{77}{100}$ dollars, with costs to be taxed.

And because the said several matters excepted to do not appear by the record in said cause the said defendant asks that this its bill of exceptions be signed and sealed by the court, and made a part of the record in this cause; which is done accordingly.

SAMUEL F. MILLER, [SEAL.]
Judge.

83 (Indorsed:) U. S. circuit court, dist. of Minnesota. N. A. Cowdry vs. The City of Winona. Bill of exceptions. Filed July 21, 1874. H. E. Mann, clerk. Thomas Wilson, atty. of deft.

84 Supreme Court of the United States.

N. A. COWDRY
vs.
THE CITY OF WINONA.

Know all men by these presents that we, The City of Winona and Henry W. Lamberton, of the county of Winona, and State of Minnesota, are held and firmly bound to N. A. Cowdry, in the city of New York, in the sum of fifteen thousand dollars, to be paid to the said N. A. Cowdry, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the 28th day of July, A. D. 1874.

Whereas the above-named The City of Winona hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Minnesota:

Now, therefore, the condition of this obligation is such, that if the above-named The City of Winona shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

THE CITY OF WINONA, [SEAL.]
By THOMAS WILSON, *its Attorney.*
HENRY W. LAMBERTON. [SEAL.]

Sealed and delivered in presence of—
85 A. F. HODGINS.
WILSON C. BROWN.

STATE OF MINNESOTA,
County of Winona, ss:

H. W. Lamberton, having been first duly sworn, doth depose and say, that he is surety above named, and signed the above bond; that he is a resident and freeholder of the State of Minnesota, and worth the sum of fifty thousand dollars over and above his debts and liabilities, and exclusive of property exempt from execution; and further saith not.

H. W. LAMBERTON.

Sworn and subscribed before me this 3d day of August, A. D. 1874.
[NOTARIAL SEAL.] WILSON C. BROWN,
Notary Public.

Approved by—

R. R. NELSON, *Judge.*

(Indorsed:) U. S. circuit court, dist. of Minnesota. N. A. Cowdry vs. The City of Winona. Bond. Filed August 11, 1874. H. E. Mann, clerk.

86 UNITED STATES OF AMERICA,
District of Minnesota, ss:

To N. A. Cowdrey, greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein the City of Winona is plaintiff in error, & you defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected & speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 6th day of August, in the year of our Lord one thousand eight hundred & seventy-four.

87 R. R. NELSON,
District Judge & one of the Judges of said Circuit Court of the United States.

I hereby acknowledge du' service of the within citation this 24th day of August, A. D. 1874.

HARVEY OFFICER,
Plff's Atty.

(Indorsed:) United States circuit court, dist. of Minnesota. N. A. Cowdry vs. The City of Winona. Citation. Filed August 11, 1874. H. E. Mann, clerk.

88 UNITED STATES OF AMERICA,
District of Minnesota, ss:

I, Horatio E. Mann, clerk of the circuit court of the United States of America for the district of Minnesota, in the eighth circuit, do hereby certify that the foregoing pages, numbered from one to eighty-eight inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of N. A. Cowdry vs. The City of Winona, as the same remain of record and on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this second day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.] HORATIO E. MANN,
Clerk.

(Indorsement on cover:) No. 149. The City of Winona, plaintiff in error, vs. N. A. Cowdrey. Minnesota. C. C. U. S. Filed 15th October, 1874.

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 149.

THE CITY OF WINONA,
Plaintiff in Error.

vs.

N. A. COWDRY,
Defendant in Error.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MINNESOTA.

BRIEF AND ARGUMENT.

THOMAS WILSON,
Attorney for Plaintiff in Error.

WINONA, MINN.
HERALD BOOK AND JOB PRINT.
1876.

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 149.

THE CITY OF WINONA,
Plaintiff in Error.

vs.

N. A. COWDRY,
Defendant in Error.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MINNESOTA.

BRIEF AND ARGUMENT.

THOMAS WILSON,
Attorney for Plaintiff in Error.

WINONA, MINN.
HERALD BOOK AND JOB PRINT.
1876.

STATEMENT OF CASE.

March 2nd A.D. 1870 the Legislature of the State of Minnesota, by an act approved that day authorized this plaintiff to issue its bonds to the amount of $100,000, for the purposes in the act specified. The preamble and first section of the act are in the words following:

"*Whereas,* The building of a railroad from St. Paul to "Winona is of great public utility and benefit, and a public "improvement which is believed will be particularly beneficial "and advantageous to the City of Winona; and

"*Whereas,* The said St. Paul and Chicago Railway will "connect by bridge or ferry at Winona, aforesaid, with the La "Crosse, Trempealeau & Prescott Railroad, now being constructed "in the State of Wisconsin, and will, when both said roads are "completed, open and furnish an unbroken line of travel through "Winona, between St. Paul and Milwaukee and Chicago, which "also is considered beneficial and advantageous to the City of "Winona, and

"*Whereas,* In view of the premises, and as an inducement "and part compensation to the Minnesota Railway Construction "Company, a corporation organized under the laws of the State "of Minnesota, and now engaged in the construction of the said "St. Paul and Chicago Railway, the City of Winona is willing "and proposes to issue and deliver to said Construction Company "its bonds to the nominal amount of one hundred thousand dol-"lars, to aid in the building of said road from St. Paul to Winona, "and thus to secure a line of travel through said city as aforesaid:

"*Therefore*, Be it enacted by the Legislature of the State of "Minnesota :

"SECTION 1. The City of Winona may at any time prior "to the first day of May, one thousand eight hundred and sev- "enty, by a vote of the majority of its Common Council, subject "to the approval and ratification of its legal voters, as hereinafter "provided, make and issue its bonds to the amount of one hun- "dred thousand dollars, with interest coupons attached thereto, "for the use and benefit of said Minnesota Railway Construction "Company, obligating the said City of Winona to pay the sums "and amounts specified therein to Russell Sage, and others, or "to the bearer, in twenty years from the first day of January, "one thousand eight hundred and seventy-one, viz: on the first "day of January, one thousand eight hundred and ninety-one, in "the city of New York, with interest at the rate of six per centum "per annum, payable semi-annually on the first day of January "and July of each year, in the city of New York. Said bonds "shall be signed by the mayor and recorder of said city, and shall "have the corporate seal of said city affixed thereto, and said cou- "pons shall be signed by said mayor and recorder, and said bonds "shall show upon their face the object for which they are issued."

The second section merely provides for the submission of the question of the issuance of such bonds to the voters of the city and for the mode of such submission.

Section 3 provides for the payment of the interest of the bonds if issued, and section 4 provides that the act shall take effect from and after its passage.

Special Laws of Minnesota A. D. 1870, page 310.

In pursuance of the authority conferred by this law the plaintiff entered into a contract with the said Minnesota Railway

Construction Company a copy of which is set out in the record on pages 15, 16 and 17, in and by which contract this plaintiff on its part agreed to execute its bonds to the amount of one hundred thousand dollars and to deposit them with the First National Bank of St. Paul to be by it held in escrow or trust and to be delivered as in the contract provided. It will be observed that the Minnesota Railway Construction Company on its part agreed.

"FIRST. To either in their own name or in that of their "successors or assigns or in the name of the St. Paul and Chica- "go Railway Company build and equip a good and substantial "railway from the city of St. Paul to the city of Winona (ex- "cept a bridge across the Mississippi River at Hastings) and to "put it into operation within three years from this date and to "connect at Winona by bridge or ferry with the La Crosse, "Trempeleau and Prescott Railroad."

"SECOND. That the said part of the said railway between "a point on the Winona and St. Peter Railroad at or near Min- "nesota City in Winona county and the village of Minneiska in "Wabasha county shall be built, equipped and put into opera- "tion within one year from this date."

"THIRD. That the La Crosse, Trempeleau and Prescott "Railroad from its terminus opposite Winona as now located and "fixed (which terminus shall not be changed without the consent "of the Council of the city of Winona) to a point on the Mil- "waukee and St. Paul Railway, East of North La Crosse, shall "be built, equipped and put into operation within the year "1870."

It was farther agreed as to the delivery of the bonds as follows:

"FIRST. "That if the said La Crosse, Trempeleau and

"Prescott Railroad is not built, equipped and put into operation as "aforesaid, between the points aforesaid, within the year 1870, "then, and in that event the said bonds and coupons shall be by "said depository returned to the city of Winona, or to its legally "authorized agent."

"SECOND. That if a railroad from a point on the Winona "and St. Peter Railroad, at or near Minnesota City, in Winona "county, to Minneiska, in Wabasha county, is not built, equipped "and put into operation as aforesaid, within one year from this "date, then, and in that event, said bonds and coupons shall be "by said depositary returned to said city of Winona, or to its le- "gally authorized agent."

"THIRD. That if a railroad is not built, equipped and put "into operation from St. Paul to Winona (except the bridge "at Hastings) as aforesaid, connecting at Winona by bridge or "ferry with the La Crosse, Trempeleau and Prescott Railroad, "within three years from this date, then, and in that event, the "said bonds and coupons shall be by said depositary returned to "said city of Winona, or to its legally authorized agent, but in "no case shall the said bonds or any part thereof be delivered by "said depositary to the said Minnesota Railway Construction "Company, until a truss railroad bridge is constructed across the "Mississippi River at Winona, connecting the said St Paul and "Chicago Railway, or the Winona and St. Peter Railroad, with "the La Crosse, Trempeleau and Prescott Railroad at the pres- "ent terminus of the last named railroad."

"But, if in each and every of the respects above mentioned, "the said railroads and the several parts of said railroads are "built, equipped and put into operation within the times and in "the manner above agreed, and said railroad bridge constructed "as above provided, then, and in that event, and in that event

"only, shall the said bonds be delivered to the sa d Minnesota "Railway Construction Company by said depositary."

"It is further agreed, that while said bonds are legally held "in custody or trust by said depositary as aforesaid, the interest "coupons, as they mature and become due, are to be delivered "to the said Construction Company."

It is also agreed as follows: "That the city of W inona "shall have no cause of action against the Minnesota Railway "Construction Company by reason of the failure to build said "lines of railroads or any part thereof."

The coupons on which this suit was brought are part of those attached to the bonds deposited with the First National Bank under this contract. It having been admitted on the trial that the city of Winona did not deliver or authorize the delivery of bonds or coupons except as aforesaid, and that the defendant in error did not receive these coupons until after their maturity, the questions arising in this case are, whether the contract had been complied with by the Minnesota Railway Construction Company, and if so, whether it was not a contract without consideration and against public policy and therefore inoperative and void.

It appeared that after the road had been built from St. Paul to the western limits of the city of Winona and after its track had there been connected with the track of the Winona and St. Peter Railroad (in March, 1872) the Minnesota Railway Construction Company obtained the said bonds and coupons from the depositary.

The point where the track of the road from St. Paul to Winona was connected with the track of the Winona and St. Peter Railroad as aforesaid is 8,571 feet west of the western end of the railroad bridge across the Mississippi River at Winona, and it was not pretended that the Minnesota Railway Construction

Company, or any other person or company, had built the road from St. Paul to Winona nearer to the west bank of the river than 8,571 feet as aforesaid.

Or that the last named road had been connected with the La Crosse, Trempeleau and Prescott Railroad except by the joining of its track as aforesaid with the track of the Winona and St. Peter Railroad, but it did appear that the Winona and St. Peter Railroad was built to the west bank of the river and there connected by bridge or ferry with the La Crosse, Trempeleau and Prescott Railroad.

A question presented in the case was whether the acts aforesaid were a compliance with the contract of the Minnesota Railway Construction Company to either in its own name or in the name of its successors or assigns or in the name of the St. Paul and Chicago Railway Company build a road from St. Paul to Winona and to connect at Winona by bridge or ferry with the La Crosse, Trempeleau and Prescott Railroad.

On this point the court ruled "that if said railroad from St. "Paul to Winona was built to any point within the city limits "of Winona and there connected with the track of the Winona "and St. Peter Railroad and the track of the last named railroad "connected with the railroad bridge across the Mississippi River "at Winona, which bridge connects with the La Crosse, Trem- "peleau and Prescott Railroad, that this was within the meaning "of the contract connecting said road from St. Paul to Winona "with the La Crosse, Trempeleau and Prescott Railroad, if after "the purchase of the St. Paul and Chicago Railway by the Mil- "waukee and St. Paul Railway Company, the last named com- "pany continued to run its cars over the railroad bridge and ov- "er the Winona and St. Peter Railroad 8,571 feet west of the "bridge." To which ruling the plaintiff in error excepted.

Another question presented was whether it was competent for this plaintiff in error to prove on the trial that neither the Minnesota Railway Construction Company, its successors or assigns, nor the St. Paul and Chicago Railway Company had obtained any right, license or authority to run trains over or to use that part of the Winona and St. Peter Railroad for the purpose of making such connection.

The plaintiff in error offered to negative any such right, license or authority which was objected to by the defendant in error and the court sustained the objection to which the plaintiff in error excepted. (Record pages 24 and 25.)

There was evidence in the case tending to show that the Minnesota Railway Construction Company had not either in its own name or in the name of its successor or assigns or in the name of the St. Paul and Chicago Railway Company, equiped or put into operation the road from St. Paul to Winona, (Record page 18.) but that it had been equipped and put into operation by the Winona and St. Peter Railroad Company or by the Milwaukee and St. Paul Railway Company under contracts made with each by the St. Paul and Chicago Railway Company, (Record pages 20 and 21.) and the plaintiff in error requested the court to rule and charge that the equipping or put-"ting into operation of said road from St. Paul to Winona, "or any part thereof, by the Milwaukee and St. Paul Rail-"way Company would not operate as a performance by the "Minnesota Railway Construction Company unless it was "done by the Milwaukee and St. Paul Railway Company as "the agent of or for the Minnesota Railway Construction "Company." which the court refused, but, on the contrary, ruled and charged that the equiping and putting into operation this road by the Milwaukee and St. Paul Railway Company or by the Winona and St. Peter Railroad Company under the contract

"Exhibit C" (Rec'd page 20)
aforesaid was a compliance with the contract by the construction company as to equipping and putting into operation the railroad, (Record pages 26 and 27.) to which the plaintiff in error excepted.

The plaintiff in error also claimed and insisted that even if the words of the contract would admit of the construction placed on them by the court as aforesaid, yet that it was competent for it to prove by parol evidence the circumstances under which the contract was made for the purpose of making apparent the intention of the parties and the true meaning of the language by them used in the contract, and offered to prove that "at the time the contract was made by & between the defendant "and the Minnesota Railway Construction Company, the Mil-"waukee and St. Paul Railway Company had a railroad running "into the city of La Crosse from the east, and that La Crosse is "on the east bank of the Mississippi River, 28 miles below Wi-"nona," (Record page 24.) and "that the building "of a line of railway from the point of intersection "or connection of the St. Paul and Chicago Railway with "the Winona and St. Peter Railroad as aforesaid (8,571 "feet west of the bridge at Winona) would have been very ex-"pensive and the right of way therefor very expensive," and "that the bluffs along the Mississippi River from Hastings to "Winona are five hundred feet high and approach so close to "Winona that a line of railroad could not be built down the "valley of the Mississippi River, on the west bank, past Wino-"na without coming to Winona." (Record page 25.) To which the defendant in error objected and the court sustained the objection, and the plaintiff in error excepted to such ruling.

The plaintiff in error also offered evidence to prove that the Chicago and Northwestern Railway Company built the bridge at Winona, and that the LaCrosse, Trempealeau and Prescott Railway Company built the LaCrosse, Trempealeau and Pres-

cott Railroad, and that the road from St. Paul to Winona was built under a contract between the St. Paul and Chicago Railway Company and the Minnesota Railway Construction Company and at the times and in the manner specified by the former company and in the contract and as and at the times and in the manner directed by the St. Paul and Chicago Railway Company and that the bonds and coupons were obtained by the Minnesota Railway Construction Company from the depositary surreptitiously and by the connivance of the depositary and without the knowledge or consent of the city of Winona—to all of which the counsel for the defendant in error objected and the court sustained the objection and plaintiff in error excepted to such ruling. (Record page 25.)

And the plaintiff in error asked the court to instruct the jury "that if the consideration of the bonds and coupons and of de-"fendant's contract with the said Construction Company was "the promise of the Construction Company to do or its actually "doing something, to do which it was previously bound under "its contract with the St. Paul and Chicago Railway Company "that was not in the eye of the law a consideration to support "the contract"—which the court refused and the plaintiff in error excepted to such refusal. (Record page 27.)

The jury having returned a verdict for the plaintiff below for $12,502.77 the court ordered judgment in his favor for that sum and costs.

The annexed diagram gives a bird's eye view of the road and points referred to.

ERRORS ASSIGNED.

The errors relied on for a reversal of the judgment are:

1.

That the court below erred in giving judgment for the plaintiff as it had no jurisdiction of the case.

2.

The court erred in excluding the evidence offered by the plaintiff in error to prove "that at the time the contract was "made by and between the defendant (plaintiff in error) and the "Minnesota Railway Construction Company (Exhibit A) the "Milwaukee and St. Paul Railway Company had a railroad run-"ning into the city of La Crosse from the East and that La "Crosse is on the East bank of the Mississippi River twenty-"eight miles below Winona."

3.

The court erred in excluding the evidence offered by this plaintiff in error "that in the year 1872 the St. Paul and Chi-"cago Railway was built past Winona on the west bank of the "Mississippi River to a point opposite La Crosse."

4.

The court below also erred in excluding the evidence offered by the plaintiff in error (Record page 24) "that neither

"the Minnesota Railway Construction Company nor the St. "Paul and Chicago Railway Company obtained, or attempted to "obtain, the right of way over or title to the track on which the "St. Paul and Chicago Railway is laid at its point of connection "with the Winona and St. Peter Railroad as aforesaid or for 900 "feet west thereof."

5.

The court below also erred in excluding the evidence offered by the plaintiff in error (Record page 25) to prove "that "the building of a line of railway from the point of intersection "and connection of the St. Paul and Chicago Railway with the "Winona and St. Peter Railroad (8,571 feet west of the bridge "at Winona) would have been very expensive and the right of "way thereof very expensive."

6.

The court also erred in excluding the evidence offered by the plaintiff in error (Record page 25) to prove "that the bluffs "along the Mississippi River from Hastings to Winona are 500 "feet high and approach so close to Winona that a line of rail-"road could not be built down the valley of the Mississippi "River on the west bank past Winona without coming to Wi-"nona."

7.

The court below erred in excluding the evidence offered by this plaintiff in error (Record page 25) to show "that the Chica-"go and Northwestern Railway Company built the truss railroad "bridge at Winona and that the La Crosse, Trempealeau and "Prescott Railroad was built by the LaCrosse, Trempealeau and "Prescott Railroad Company."

8.

The court below also erred in excluding the evidence offered by the plaintiff in error to prove (see Record page 25) "that at no time during the time that he (James H. Stewart) was "General Superintendent of the Winona and St. Peter Railroad "Company (for seven years prior to the trial below) had any "company or person other than the Winona and St. Peter Rail-"road Company any right to run cars over the track of the Wi-"nona and St. Peter Railroad between the west end of the rail-"road bridge at Winona and Minnesota City (five miles west of "Winona) except the Milwaukee and St. Paul Railroad Com-"pany and during the last winter the Green Bay and Minnesota "Railroad Company."

9.

The court below erred in excluding evidence offered by this plaintiff in error (Record page 25) to prove "that the railroad "from St. Paul to Winona was built under a contract (Exhibit "B) between the St. Paul and Chicago Railway Company and "the Minnesota Railway Construction Company and at the times "and in the manner specified by that company (St. Paul and "Chicago) and in that contract and as and at the times and in "the manner directed by the said St. Paul and Chicago Railway "Company and that the said bonds and coupons were obtained "by the Minnesota Railway Construction Company from the de-"positary surreptitiously and by the connivance of the deposit-"ary and without the knowledge or consent of the city of Wi-"nona."

10.

The court below erred in charging the jury "that the Mil-"waukee and St. Paul Railway Company having purchased the "St. Paul and Chicago Railway (as appears by Exhibit D; set "out above,) it is the successor of the Minnesota Railway Con-"struction Company within the meaning of the said contract be-"tween the defendant and the said Minnesota Railway Construc-"tion Company, (Exhibit A) and the equipping and putting in-"to operation of the said railroad by the said Milwaukee and St. "Paul Railway Company was a compliance with and a perform-"ance of the said contract to equip and put into operation said "road by the Minnesota Railway Construction Company, its "successors or assigns;" to which charge and ruling the defend-ant then and there duly excepted.

11.

The court also erred in charging "that it appearing that the "Winona and Peter Railroad Company equipped and put into "operation the railroad from Weaver to Minnesota City under "the contract with the St. Paul and Chicago Railway Company, "(marked 'Exhibit C' in the bill of exceptions,) that was a com-"pliance with the contract by the Construction Company as to "equipping and putting into operation that part of the said rail-"road"; to which ruling and charge the defendant (plaintiff in error) then and there duly excepted.

12.

The court also erred in further instructing the jury that "if the said railroad from St. Paul to Winona was equipped and "put into operation by the St. Paul and Chicago Railway Com-

"pany, or by the Minnesota Railway Construction Company or "by the assigns of either, that was a sufficient compliance with "the said contract ('Exhibit A') as to the equipping and putting "into operation of the said railroad"; to which ruling and charge the defendant (plaintiff in error) then and there excepted.

13.

The court also erred in further instructing the jury as follows: "That if said railroad from St. Paul to Winona was built "to any point within the city limits of Winona, and there con- "nected with the track of the Winona and St. Peter Railroad "and the track of the last named railroad connected with the "railroad bridge across the Mississippi River at Winona, which "bridge connected with the La Crosse, Trempealeau and Pres- "cott Railroad at the point named in Exhibit A, that this was "within the meaning of the said contract, Exhibit A, a connect- "ing of the said railroad from St. Paul to Winona by bridge or "ferry with the La Crosse, Trempealeau and Prescott Railroad, "if, after the purchase of the St. Paul and Chicago Railroad by "the Milwaukee and St. Paul Railway Company, the last named "company continued to run its cars over the said railroad bridge "and over the Winona and St. Peter Railroad 8,571 feet west of "said bridge;" to which ruling the defendant (plaintiff in error) then and there excepted.

14.

The court below erred in refusing to charge the jury as requested by the plaintiff in error "that the equipping or putting "into operation of said railroad from St. Paul to Winona, or any "part thereof, by the Milwaukee and St. Paul Railroad Com- "pany would not, and did not, operate as a performance by the

"Minnesota Railway Construction Company, unless it was done "by the said Milwaukee and St. Paul Railway Company as the "agent of or for the said Minnesota Railway Construction Com- "pany ;" and the plaintiff in error then and there duly excepted to such refusal and ruling.

15.

The court below erred in refusing to charge the jury as requested by the plaintiff in error. "That the building of a rail- "way from St. Paul to the western limits of the city of Winona, "and there connecting with the Winona and St. Peter Railway "at a point between one and two miles west of the west end of "the railroad bridge (or ferry landing) connecting the Winona "and St. Peter Railroad with the La Crosse, Trempealeau and "Prescott Railroad, was not a compliance with the said contract "with the said city of Winona, and was not a connecting of the "said railway from St. Paul to Winona by bridge or ferry with "the La Crosse, Trempealeau and Prescott Railroad within the "meaning or purview of the said contract"; and the plaintiff in error then and there duly excepted to such refusal or ruling.

16.

The court below erred in refusing to charge the jury as requested by the plaintiff in error "that it was incumbent on the "said Construction Company in order to comply with said con- "tract with the city of Winona not only to construct a railway "from St. Paul to Winona, but to connect said railway by bridge "or ferry with the La Crosse, Trempealeau and Prescott Rail- "road without the intervention or use of any part of any other "railway in making said connection"; and the plaintiff in error then and there duly excepted to such refusal or ruling.

17.

The court below erred in refusing to charge the jury as requested by the plaintiff in error: that, "It was incumbent on "the Minnesota Railway Construction Company, (in order to "comply with its said contract with the city of Winona,) either "in its own name, or in the name of its successors or assigns, or "in the name of the St. Paul and Chicago Railway Company, "to build, equip and put into operation a railroad from St. Paul "to Winona, and to connect it by bridge or ferry with the La "Crosse, Trempealeau and Prescott Railroad and the doing of "these acts, or any of them, by any other company or person, "except as the agent of or for the said Minnesota Railway Con- "struction Company, would not operate as a performance on its "part of said contract;" and the plaintiff in error then and there duly excepted.

18.

The court below erred in refusing to charge the jury as requested by the plaintiff in error that, "if the consideration of "the bonds and coupons and of defendant's contract with the "said Construction Company was the promise of the said Con- "struction Company, to do or its actually doing, something to do "which it was previously bound under its contract with the St. "Paul and Chicago Railway Company, that was not in the eye "of the law a consideration to support the contract"; and the plaintiff in error then and there duly excepted to such refusal or ruling.

POINTS.

I.

It does not appear from the record that the payees of the coupons sued on (*who it is alleged assigned* them to this defendant in error) are citizens of a State other than that of Minnesota, and therefore it does not appear that the Circuit Court had jurisdiction.

1 U. S. Stat. at large, page 79 Sec. 11.
Turner vs. Bank of North America 4 Dallas 8.
Mollan vs. Torrance 9 Wheaton 537.
Sheldon vs. Sill 8 How 441.

II.

Under the contract entered into by and between the Minnesota Railway Construction Company and the city of Winona it was incumbent on the former in order to become entitled to the bonds of the latter to build, equip and put into operation the road from St. Paul to Winona *and to there connect it by a bridge or ferry with* the La Crosse, Trempealeau and Prescott Railroad and the building of said road to the western limits of the city of Winona and there connecting its track or rails with the track or rails of the Winona and St. Peter Railroad was not such a connection as was required and provided for by the contract. And this is especially so in the absence of any evidence that the Minnesota Railway Construction Company acquired or had any right to use any part of the Winona and St. Peter Railroad for the purpose of making such connection.

Special Laws of Minnesota for A. D. 1871, page 271, Sec. 2.
Laws of Minnesota for A. D. 1856, page 328, Sec. 13.
Special Laws of Minnesota for A. D. 1872, page 490, Sec. 3.
Special Laws of Minnesota for A. D. 1872, page 432, Sec. 4.
Special Laws of Minnesota for A. D. 1872, page 485, Sec. 2.
Special Laws of Minnesota for A. D. 1872, page 488, Sec. 3.
Laws of Minn. for A. D. 1864, page 176, Sec. 4.
Brown vs. Foster 113 Mass. 136.
McCarren vs. McNulty 7 Gray 139.
Abley vs. Dale 11, Com. Bench (73 E. C. L.) 390—1.
Newell vs. The People 7 N. Y. 97.
Woodward vs. Watts 2 E & B (75 E. C. L.) 456.
Hud. Canal Co. vs. Penna. Coal Co. 8 Wallace 290.
Green vs. Biddle 8 Wheaton 89—90.
Dermott vs. Jones 2 Wallace 7 and 8.
The Harriman, 9 Wallace 161.
Swain vs. Seamens, 9 Wallace 254.
Commissioners vs Gaines, 3 Brevard (S. C.) 396.
Cook vs. Jennings 7 Term Reports 381.
Aspdin vs. Austin 5 Ad and E (48 E. C. L.) 671.
Hare vs. Horton 5 B and Ad (27 E. C. L.) 728.
Dickson vs. Zizinia 10 Com. B. (70 E. C. L.) 602.
Line vs. Stephenson 4 Bing. N. C. (33 E. C. L.) 678.
Line vs. Stephenson 5 Bing. N. C. (35 E. C. L.) 183.
Ripley vs. Larmouth 56 Barb. 21, 25, 26.
Gifford vs. First Pres. Soc. 56 Barb. 118.
Marvin vs. Stone 2 Cowen 781, 806.
Blacket vs. Ins. Co. 2 Crompt. and J 244, 251.
Dunell vs. Col. Ins. Co. 2 Sum. 366, 380, 381.
Palmer vs. Warren Ins. Co. 1 Story 360.
Chandler vs. St. Paul Fire and Ma. Ins. Co. 21 Minn. 87, 88.
Saunders vs Haines 44 N. Y. 359.
Hathaway vs. Power 6 Hill 453, 457.
Stourbridge Canal Co. vs. Wheeley 2 B and Ad (22 E. C. L.) 792.
Smith Stat. Con. page 650, Sec. 504.

Dubuque R. R. Co. vs. Litchfield 23 How. U. S. R. 88.
Tyler Ex. vs. E. and P. R. Co. 9 Bush 515, 516.
James vs. Dubois 1 Harrington 285.
Den vs. Schenk 3 Halstead 34.
Smith Statutory Law 673.
Lamson vs. Schneller 33 Wis. 288.

III.

It was competent to show by parol evidence the circumstances under which the contract was made for the purpose of bringing out the true meaning of the language used. Hence the court erred in the rulings pointed out in the 2, 3, 4, 5 and 6 assignments of error above.

1 Greenleaf's Evidence sec. 288.
French vs. Carhart 1 Com. (N. Y.) 96, 100, 101.
Addison on Con. (2 Am. Ed.) 847.
Bradley vs. Packet Co. 13 Pet. 94.
Cole vs. Wendel 8 John R 117.
Lowry vs. Adams 22 Vt. 160.
Hart vs. Hammon 18 Vt. 127.
Sanford vs. Newark and Hud. R. R. Co. 37 N. J. 1.

IV.

The performance must be by the person who was bound to do or perform the act to be done.

2nd Pars on Contracts (6th ed.) 635.
2 Chitty on Con. (11 Am. ed.) 1,057.
2 Story on Con. (5 ed.) sec. 1,321—1,322.
McLean vs. Nugent 33 Wis. 353.
Van Renselaer vs. Aiken 44 N. Y. 126.

V.

The voluntary performance of an act or the promise to do an act which it was before legally incumbent on the party to perform is not in law a sufficient consideration to support a contract.

Shadwell vs. Shadwell 9 Com. B R. (99 E. C. L.) 159, 178.
Hank vs. McFarland 17 Iowa 124.
Insurance Co. vs. Watson 59 N. Y. 390, 395.
Smith vs. Bartholemew 1 Met. (Mass.) 276, 278.
Kellogg vs. Olmsted 28 Barb. 96.
" " 25 N. Y. 189.
Cobb vs. Cowdry 40 Vt. 25.
Cole vs. Shurtliff 41 Vt. 311.
Reynolds vs. Nugent 25 Ind. 328.

VI.

The contract between the city of Winona and the Minnesota Railway Construction Company was merely an offer by the former to the latter subject to be revoked at any time before it was accepted and acted on and inasmuch as it was not accepted or acted on by the Minnesota Railway Construction Company it did not bind the city.

U. & S. R. Co. vs. Brinkerkoff 21 Wend. 138.
McKinly vs. Watkins 13 Ill. 140.

VII.

Said contract was against public policy and therefore void.

Bestor vs. Wathen 60 Ill. 138.
Fuller vs. Daine 18 Pick. 472.
Pac. R. R. Co. vs. Seely 45 Missouri 212.
Holliday vs. Patterson (Oregon) 2 Cent. L. J. 63.
9 West J. 156.
Trist vs. Child 21 Wallace 441.
2 Chitty on Con. (11 Ed.) 782, 796.

VIII.

The pretended consideration for the contract was in the eye of the law impossible and therefore the contract was void.

Nerot vs. Wallace 2 Term Report 17.
Bates vs. Cort 2 Barn & Cress (9 E. C. L.) 474.
Harvey vs. Gibbons 2 Lev. 161.

IX.

When the meaning of a written instrument is to be judged by extrinsic evidence the construction is a question of fact for the jury.

Ganson vs. Madagan 15 Wis. 144.
Merriam vs. Field 29 Wis 592.
Jennings vs. Sherwood 8 Conn. 122.
Savage Man. Co. vs. Armstrong 17 Maine 34.
Price vs. Mouat 11 Com B. (103 E. C. L.) 508.

ARGUMENT.

I.

As to the question of jurisdiction I rely on the language of the 11th section of the Judiciary Act above cited, which is as follows: "Provided that no Circuit Court shall have cogniz- "ance of any suit to recover the contents of any promissory note "or other chose in action in favor of an assignee, unless a suit "might have been prosecuted in such court to recover the said "contents if no assignment had been made, except in cases of for- "eign bills of exchange."

The defendant in error sued as assignee of the coupons on which this suit is brought, see complaint in Record, page 3. There is no allegation showing that Sage and others, the assignors, were not citizens of this State.

II.

As to the second point I wish to call the attention of the court particularly to the language of the contract entered into between the city of Winona and the Minnesota Railway Construction Company.

It will be observed that the Minnesota Railway Construction Company does not agree to build or equip the La Crosse, Trempealeau and Prescott Railway, but that it does agree to build, equip and put into operation the road from St. Paul to Winona, and to connect it at Winona by bridge or ferry with the La Crosse, Trempealeau and Prescott Railway at the terminus of the latter road as then fixed opposite the city of Winona—which terminus, it was expressly provided, should not be changed without the consent of the city of Winona.

This language is all very plain and unambiguous—and it shows, it seems to me, unmistakably the point at which and the means or manner by which the connection was to be made with the La Crosse, Trempealeau and Prescott Railroad.

I was not aware until informed in the trial of this suit that there could be any doubt about the meaning of this language. In ordinary phrase in such connection the verb "connect" is synonomous with the verb "unite" or "join" and the participle or adjective "*connecting*," with the words "uniting" and "conjoining" and a reference to our best lexicographers shows that the common or ordinary signification does not differ from the proper or strict etymological signification. Webster defines the transitive verb *connect*—"to knit, link or fasten together as by something intervening, or by weaving, winding or twining"—"hence "to establish a bond relation or association between," and the intransitive verb he defines as follows: "*to become joined, united "or coherent,*" "to have a close relation," and the participle or adjective "*connecting*" is defined by the words "uniting and "conjoining" and in this sense they are used by our writers, professional and non-professional.

But as this contract is made in pursuance of an act of our Legislature—the sense in which the words have been used in our Statutes may throw some light on the meaning here.

The words are very frequently found in our Statutory enactments concerning railroads, and I believe in every instance in the sense above given. See laws above cited.

It will be observed by reference to the statutes above cited, and I could multiply illustrations almost indefinitely that in the legislation of our State these words are used in the sense above suggested. I think I may safely challenge the counsel for the defendant in error to show one instance of their use in our laws

with any different meaning. When we speak of *railroads* connecting it means a *physical* connection or a junction—a business connection can be predicated of *companies* only.

I shall argue therefore, (1.) That in construing this statute and contract the court should give to this language its ordinary and natural signification. (2.) That the circumstances which the parties had in view when the contract was made, clearly show that no other meaning than this was intended. (3.) That the words of the contract expressing the manner or means by which the connection should be made—"*by bridge or ferry*"—are conclusive as to the construction and meaning of the contract in this respect; and (4.) That even if the language was ambiguous and the meaning of the contract obscure or doubtful in this respect that doubt should be resolved in favor of the plaintiff in error.

(1.) The rule above stated is well expressed in Newell *vs.* the people, 7 N. Y. 97, as follows: "whether we are considering "an agreement between parties, a statute, or a constitution, with a "view to its interpretation, the thing we are to seek is, the thought "which it expresses. To ascertain this, the first resort in all "cases is to the natural signification of the words employed in "the order and grammatical arrangement in which the framers "of the instrument have placed them. If thus regarded the "words embody a definite meaning which involves no absurdity "and no contradiction between different parts of the same writ-"ing, then that which is the meaning apparent upon the face of "the instrument is the one which alone we are at liberty to say "was intended to be conveyed. In such case there is no room "for interpretation. That which the words declare is the mean-"ing of the instrument and neither the courts nor the legislature "have the right to add to or take away from that meaning. This "is true of every instrument."

See the other authorities cited on this point.

But, say the counsel for the defendant in error, "though "the words of the obligatory part of the contract are that the "road from St. Paul to Winona shall *connect* &c., with the La "Crosse, Trempealeau and Prescott Railroad, yet the recitals "show that this language is not to have its proper or ordinary "signification and that the contract was only intended to secure "a line of travel through Winona which was secured by the con- "nection made with the Winona and St. Peter Railroad Com- "pany," &c.

There are many obvious and conclusive answers to this position. If all Winona wanted was a line of travel through the city it had secured that by the building of the road from St. Paul to a point on the Winona and St. Peter Railroad at Minnesota City and much of the contract is redundant, meaningless and absurd, which is not to be presumed.

On the contrary it is be so expounded as to give effect to every sentence, clause or word if possible. Sedgwick on Con of Stat. (2 Ed.) 200 & notes.

But it is not true that the preamble of either the act or contract is inconsistent with the view which has been taken by the plaintiff in error of the meaning of the contract; on the contrary it corroberates and confirms that view.

Both the statute and the contract in the preamble recite that, "whereas the St. Paul and Chicago Railway will connect "by bridge or ferry at Winona with the La Crosse, Trempealeau "and Prescott Railroad now being constructed, and will, when "both of said railroads are completed, *open and furnish an un- "broken line of travel by railroad* through Winona."

If these two roads now furnish an "*unbroken*" line of travel so would two roads 100 miles apart?

The court will not fail to observe that over or on the intermediate road which I suppose it will be claimed opened and furnished the unbroken line of travel—the Minnesota Railway Construction Company had not secured a right to pass. If possible the preamble makes more clear and emphatic the fact that the plaintiff in error contracted not alone for a line of travel, but for an *unbroken* line of travel through Winona by the means of the railroads and connections specified and to the very points specified. But even if the recitals or preambles were inconsitent with the operative part of the contract, the former would not control or qualify the latter.

It is well settled that when the words of the operative part of a contract convey a definite meaning they cannot be controlled by the recitals or preamble.

Salkeld vs. Johnson 2 Exchequer 283.
Gaunt vs. Brookman 2 Hardin (Ky.) 343.
U. S. vs. Briggs 9 Howard 351.
Nichols vs. Wells Sneeds (Ky.) Dec. 255.
Saunder vs. Haines 44 N. Y. 361.

The rule is well expressed thus, "when the words in the "operative part are clear and unambiguous they cannot be con- "trolled by the recitals but when on the other hand those words "are of doubtful meaning, the recitals and other parts of the "deed may be used as a test to discover the intention of the par- "ties and to fix the true meaning of the words."

Walsh vs. Trevanion 5 Ad. & Ed. (69 E. C. L.) 751.

(2.) But not only is the language of the contract clear but the circumstances show that it truly expresses the meaning of the contracting parties.

Let it be observed that when the contract was made the road from St. Paul to Winona was being constructed and was built to Hastings, 20 miles below St. Paul, and graded part of the way between Hastings and Red Wing (Record page 22) and the La Crosse, Trempealeau and Prescott Railroad was being constructed (Record page 15) and the Winona and St. Peter Railroad had been built for many years. (Record pages 25, 16.) The road from St. Paul to Winona was to connect in the first place with the Winona and Peter Railroad at Minnesota City, (Record page 16) and while it is provided that this connection at Minnesota City should be made within one year from the date of the contract and that the La Crosse, Trempealeau and Prescott Railroad should be built within the year 1870, yet it was particularly specified and contracted that within three years from the date of the contract the road should be built to Winona and there connected by bridge or ferry with the La Crosse, Trempealeau and Prescott Railroad at a point designated and fixed. The road could not have been built past Winona without connecting with or cutting the Winona and St. Peter Railroad. It will be observed too that there was, when the contract was made, a clear moral certainty that the road was about to be built very soon and that the city of Winona was about to secure all that it has secured without the payment of a dollar. It will hardly be presumed that the plaintiff gave $100,000 without any consideration or the promise of any equivalent. But if the court will take into consideration the position of the city of Winona and the circumstances when that contract was made it will not be difficult to observe and appreciate at least some of the motives which actuated it in making the contract and some of the benefit which it hoped to derive from the building of the road to the bank of the river at the point particularly designated. It will

be observed that La Crosse, the business rival of Winona, is situated 28 miles below Winona on the east bank of the river. That if the connection was made as bargained for the line of road made Winona the terminal point on the river and cut off La Crosse, according to the terms of the contract this was inevitable, as the La Crosse, Trempealeau and Prescott Railroad was to touch the Milwaukee and St. Paul Railway *east* of North La Crosse. The road too from St. Paul to Winona was required to make its terminus at the river at just the point which Winona selected and which it believed would be promotive of its interests.

The large expenditure required to build the road to this point made it certain that it would not be removed therefrom—besides it could not afford, for the purpose of securing $100,000 from us, to expend a much larger sum.

The court will observe too, how particular the city was as to the very point to which the road should be built and at which the connection by bridge or ferry should be made, which shows how important that point was considered.

(3) But I have thus far considered the contract as if it in language merely provided that the one road should "connect" with the other without any words of qualification or limitation. But this is not so. It specifies the manner, means or instrument of connection, thus showing clearly that the parties considered that aspect of the case and provided for it.

The language is "*connect by bridge or ferry*"—language of limitation—and the court must presume that this language was used intelligently and according to its ordinary signification.

The meaning of this language clearly is that the Minnesota Railway Construction Company should build the road from St. Paul to a point in Winona on the west bank of the Mississippi

River which would be touched by a bridge or ferry connecting with the western terminus of the La Crosse, Trempealeau and Prescott Railway as it was then fixed. The language used was apt and proper to clearly indicate and fix the point to which the road should be built on the west bank.

The Supreme Court of South Carolina saysin the case of the Com. of the Poor *vs.* Garner 3 Brevard, 396: "when an act "of assembly requires a thing to be done in a particular way "that way, and that alone, must be pursued."

Even if it were admitted that the agreement to *connect* without any qualifying words would have authorized the making of such connection by the use of a part of the line of the Winona and St. Peter Railroad, yet the maxim *expressum facit cessare tacitum* here applies and the mode or means expressed must be held to be exclusive of any other.

In Hare *vs.* Horton 3 Barn. and Ad. (27 E. C. L.) 715, A bargained and sold to B a foundry and two dwelling houses "to-"gether with all the grates, boilers, bells and other fixtures in "and about said two dwelling houses," and the question presented to the court was whether by the contract or deed the foundry fixtures passed which the court decided in the negative. In delivering the opinion in the case Taunten J uses this language: "On "the first part I confess I have not been able to entertain much "doubt. It is very plain that if the granting part of the deed "had only mentioned the foundry, messuages, and dwelling hous-"es, the foundry fixtures as well as those in the dwelling houses "would have passed; there are many cases which show this. "But as the deed goes on to say together with all the grates, "boilers, bells and other fixtures in and about the said two dwell-"ing houses, I think the mention of these fixtures excludes those "in the foundry on the principle *expressio unius est exclusio al-"terius*, &c."

In a lease the word *demise* raises by legal implication a covenant of title in the lessor and quiet enjoyment in the lessee. But if in such a lease with the word *demise* there is an express covenant for quiet enjoyment on the principle aforesaid there is no implied covenant for title.

Line vs. Stephenson 4 Bing. N. C (33 E. C. L.) 676.
" " 5 Bing. N. C. (35 E. C. L.) 183.

Lord Denman in delivering the opinion of the court in Aspden *vs.* Austin uses this language: "when parties have ent- "ered into written engagements with express stipulations it is "manifestly not desirable to extend them by implication the pre- "sumption is that having expressed some they have expressed all "the conditions by which they intend to be bound under that in- "strument."

5 Ad. and El. (48 E. C. L.) 684.

Maule Justice in case of Dickson *vs.* Zizinia says: "we "should not, by inference, insert in a contract implied provisions "with respect to a subject which the contract has expressly pro- "vided for. If a man sell a horse, and warrant it to be sound, "the vendor knowing at the time that the purchaser wants it "for the purpose of carrying a lady, and the horse, though sound, "proves to be unfit for that particular purpose. This would be "no breach of the warranty. So in respect with any other kind "of warranty; the maxim, *expressum facit cessare tacitum*, ap- "plies to such cases. If it were not so it would be necessary for "the parties to every agreement to provide in terms that they "are to be understood as not to be bound by anything which is

"not expressly set down—which would be manifestly incon-
"venient."

10 Com. Bench (70 E. C. L.) 610, 611.

So where in a charter-party the shipper covenanted to pay freight for goods "*delivered at A*" and the ship was wrecked at B and the defendant then accepted his goods he was still held not bound to pay freight *pro rata itineris* although he would in the absence of such a contract and under an ordinary charter-party be bound to pay a proportionate part of the freight.

Cook vs. Jennings 7 Term Reports, 381.

While the parties here have contracted in express terms that the two roads shall be connected "*by a bridge or ferry*" the defendant asks the court to insert by construction the words "or "by the use of a part of the line of the Winona and St. Peter "Railroad." The rule above stated, which an eminent writer has said, "is a principle of logic and of common sense, and not merely a technical rule of construction"—forbids this. To use the language of this court: "If the parties have made no "provisions for dispensation the rule of law gives none. It does "not allow a contract fairly made to be annulled, and it does not "permit the interpolation of what the parties themselves have "not stipulated."

Dermott vs. Jones 2 Wal. 8.
See also School Trustees of Trenton vs. Bennett 3 Dutcher 520.
Hud. Canal Co. vs. Penn. Coal Co. 8 Wal. 290.
Swain vs. Seamens 9 Wal. 254.
The Harriman, 9 Wal. 161, 171.

This case is much stronger than any of those cited. The *language* here used *ex vi termini* excludes the right to use any other means than the "bridge or ferry" to effect the connection of the two roads named while that used in the cases referred to does not.

(*4.*) But even if there was any legal doubt as to the true interpretation of the contract in the respect noticed, that doubt should be resolved in favor of the plaintiff in error. The rule in such cases is that the words of the grantor, contractor or covenantor shall be taken most strongly against himself in cases of doubt, whether they occur in a deed poll or in an indenture. This would be so in a contract as between any parties, but, when a statute of this kind is enacted or a contract of this kind entered into for the benefit of a railway or other company it is regarded as a contract between a company of adventurers and the public, the terms of which are set forth in the act or contract and the rule of construction in all such cases is fully established to be that any ambiguity in the law or the contract will operate against the adventurers and in favor of the public.

In delivering the opinion of the Court of King's Bench in the case of Canal Co. *vs.* Wheelly, Lord Ch. J. Tenterden said: "This, like many other cases, is a bargain between a company of "adventurers and the public, the terms of which are expressed "in the statute and the rule of construction in all such cases is "now fully established to be this—that any ambiguity in the "terms of the contract must operate against the adventurers and "in favor of the public, and the plaintiffs can claim nothing "which is not *clearly* given them by the act."

2 Barn. & Ad. (22 E. C. L.) 792.

This court gives its unqualified sanction to this rule in, Dubuque and Pacific Railway Company *vs.* Litchfield, 23 Howard 88, in the following language: "We concur with the following "citation and reasoning of the plaintiffs' counsel, to wit: Lord "Ellenborough in his judgment in Gildart *vs.* Gladstone, 11 "East. 675, says: If the words would fairly admit of different "meanings it would be right to adopt that which is more favor- "able to the interest of the public and against that of the com- "pany because the company in bargaining with the public "ought to take care to express distinctly what payments they are "to receive and because the public ought not to be charged unless "it is clear that it was so intended."

"The reason of the above rule is obvious,—parties seeking "grants for private purposes usually draw the bills making them. "If they do not make the language sufficiently explicit and clear "to pass everything that is intended it is their own fault, while on "the other hand such a construction has a tendency to prevent "parties from inserting ambiguous language for the purpose of "taking by ingenious interpretation and insinuation that which "cannot be obtained by plain and express terms."

The case of Tyler Ex. *vs.* E. & P. R. Co. 9 Bush. 510, is like the one at bar, and in that case the court of appeals of Ky., say: "The right of railroad companies to ask from local com- "munities assistance involving the necessity of taxation will not "be enlarged by construction. Privileges of this character are "in derogation of individual rights. They will not be implied "but must be clearly and unmistakably granted."

I believe no authority can be found speaking a different language.

The fact that cars have been run over that part of the road of the Winona and St. Peter Railroad Company by the Milwau-

kee and St. Paul Company cuts no figure in this case, the latter company is a stranger to this transaction. And it is not even pretended that it had the right to use any part of the Winona and St. Peter Railroad for any fixed or definite time or except temporarily by the sufferance of the Winona and St. Peter Railroad Company.

But even if it be admitted for the purpose of the argument that it was competent for the Minnesota Railway Construction Company in performance of its contract to form its connection with the La Crosse, Trempealeau and Prescott Railroad by the use of a part another railway yet it would certainly be incumbent on it to secure either a *permanent* right to run over such road, or at least a right to run over it for a reasonable length of time. The tacit permission to run trains over this part of the road until the defendant in error could obtain a decision of this suit would certainly not be a substantial compliance with the contract—if so, a connection thus made for one week, or even a day, without any right or authority longer to continue it would be sufficient.

But even if there had been obtained a lease of that portion of the Winona and St. Peter Railroad necessary to make the connection that would not have been a compliance with the contract.

See Lawson vs. Schnellen 33 Wis. 288.

In that case it appeared that the laws of Wisconsin authorized the issue of railroad aid bonds by certain towns "upon such "terms and conditions as shall be agreed upon by and between "the town and the railroad company."

The terms of a railroad proposition made to the town of M. by a railroad company (under this act) were such that the bonds

of the town in a certain sum were to be delivered to the company only in case it should have constructed a railroad track to the Wolf river, either from a certain point in the town of N. or from some point in the town of M. to be agreed on between the company and the authorities of the town. The company adopted as a part of its line between the Wolf river and one of the points named in the proposition the road of another company and did not build a separate road of its own between said river and either of said points, and the court held that there was not a performance by the company of the conditions precedent and that it was not entitled to the bonds.

The court in delivering the opinion says: "It is under-"stood from the arguments of counsel at the bar, but not from "any allegation to that effect found in the complaint, that the "railroad company defendant has procured the license or permis-"sion of the Northwestern Railway company to run over its "track for the distance of two or three miles into the town of "Menasha."

"The terms of this license or lease, and whether for a long "or short period of time, has not been made known to us, nor does "it seem material that we should know. It is enough that one of "the conditions of the proposition submitted by the company to "the voters plainly required the company to construct an inde-"pendent line of road, of which it should be the owner, from one "or the other of the points named in the proposition, to the Wolf "river, and that it is averred that such condition has not been "complied with by the company.

"Counsel for the company urges that the advantages to the "town are, and will continue to be the same as if an independent "line of road had been built.

"This court cannot say that these things are or will be so; "but if it could, it has no power to dispense with the performance "of the condition. Courts can not place themselves in the posi- "tion of either of the parties to a contract, and say that this or "that stipulation or condition shall be abandoned or dispensed "with, because they may think it is or will be of little or no val- "ue to such party. It is sufficient that the parties have so agreed, "and the duty of the court is to give effect to their agreement. It "is easy to perceive, nevertheless, how the building of an inde- "pendent line of road, to be owned by the company in which the "town takes its stock, might be of the very greatest benefit to the "town and its inhabitants, and why the voters should stipulate for "and might reasonably and justly insist upon its being built.

"Aside from the enhanced value of the road itself, and of the "stock, it might afford very great additional facilities over those "furnished by a road already built and in operation. The lease "may be but for a short time, or subject to termination or forfeit- "ure, when all direct advantage of the road would be lost. It "may be subject to conditions which are unjust and oppressive to- "wards the inhabitants, and thus they become the losers."

One more suggestion might be perhaps properly made, viz: The parties themselves have shown the meaning which they attached to the words *connect* and *connecting*. In a latter clause in the contract the word connecting is so used that there can be no question but that they meant thereby the making of a direct connection and it is a well settled rule as announced by the Supreme Court of New Jersey, that "Just construction requires the "same words to be used in the same sense in the same instru- "ment."

See also the sense in which the word "connect" is used in the preamble of the Contract (Exhibit A) and in the enabling act authorizing the issuance of the bonds and coupons.

Den vs. Schenk 3 Halsted (8 N. J. R.) 34.
James vs. Dubois 1 Har. (Del.) 285.
Smith's Com. on Construction page 673.

III.

The court below, I think, erred in refusing to permit this plaintiff in error to show the circumstances under which the contract was made, see assignments of error 2, 3, 4, 5 and 6.

The rule of law is too well settled to admit of question that the court in interpreting a contract should place itself as nearly as may be in the position of the parties at the time of entering into the contract, and then to read and interpret the language used in the light thrown on it by the circumstances.

The rule is clearly expressed in Addison on contracts (2 Am. Ed.) 847, as follows: "To enable us to arrive at the real "intent of the parties, and to make a correct application of the "words and language of the contract to the subject-matter there- "of, and the objects professed to be described, all the surrounding "facts and circumstances may be taken into consideration. The "law does not deny to the reader the same light and information "that the writer enjoyed; he may acquaint himself with the "persons and circumstances that are the subjects of the allusions "and statements in the written agreement, and is entitled to place "himself in the same situation as the party who made the con- "tract, to view the circumstances as he viewed them, and so "judge of the meaning of the words and of the correct applica- "tion of the language to the things described," and so the authorities all are.

This court cannot fail to observe how clearly the meaning of the language of the contract and the intention of the parties might have been brought out had the evidence excluded been

received and considered. For instance, had it been proven that the Milwaukee and St. Paul Railway Company had in 1870, when the contract was made, a line of road running east from the city of La Crosse, that would have shown clearly why the city of Winona was so anxious to make *a permanent* crossing of the river at Winona and the turning of business over a line which passed *east of La Crosse*, the business rival of Winona on the river.

Farther, had it been shown that the building of a line of road from the point of intersection and connection of the St. Paul and Chicago Railway with the Winona and St. Peter Railroad (8,571 feet west of the bridge at Winona) would have been very expensive and the right of way therefor very expensive, it would have made clear and intelligable the object which Winona had in offering such a subsidy to a road which was then in process of speedy construction.

If the road from St. Paul to Winona would invest a large sum in building down to that crossing it gave us the guaranty of such an expenditure of money that its line and crossing would then be permanent. It would hardly be presumed that it would expend hundreds of thousands of dollars merely to obtain $100,000 from us.

Or if it had been shown that the bluffs along the Missisippi River from Hastings to Winona are 500 feet high and approach so close to the city of Winona that a road could not be built down the valley on the west bank past the latter city without coming to it, it would then have been quite apparent that there was no reason to suppose that a little town like Winona, of 8,000 to 9,000 inhabitants would give $100,000 to a road which it was morally certain to secure without the expenditure of one dollar.

It would have gone to show that the object of the city was

not merely to secure the building of the road to Winona but to secure the building of it to such a point in the city as it might not otherwise build to and as might subserve the interest of the city.

Had it been shown too that the Minnesota Railway Construction Company had not even attempted to obtain the right of way from the point where its main line runs west of and back of the city of Winona to a point where its track crosses or connects with the track of the Winona and St. Peter Railroad, and had it also been shown that in the summer of 1872 it built its line of road down past the city of Winona to a point on the west bank of the river opposite La Crosse these facts in connection with the fact that it had not obtained any right to run over any part of the Winona and St. Peter Railroad would have shown not only that it did not attempt to secure any permanent *right* to make an indirect connection by the use of a part of the Winona and St. Peter road but that it did not intend to make such connection.

With these facts proven the non-compliance with the contract by the Minnesota Railway Construction Company, either in letter or spirit, would have been clear.

IV. I had before the trial of this case supposed it to be unquestionable as a legal proposition that performance must be by the persons bound to do or perform the act to be done.

I do not mean by this that I have not been well aware of the meaning and force of the legal maxim that he who acts by or through the medium of another is in law considered as doing it himself.

The language of the contract is as follows: "The Minne-"sota Railway Construction Company hereby on their part " * * * * agree:

"First.—To either in their own name or in the name of their "successors or assigns, or in the name of the St. Paul and Chica- "go Railway Company, build, equip and put into operation a "good and substantial railway from St. Paul to Winona," &c.

The clear meaning of this language is that the Minnesota Railway Construction Company shall do this—for abundant caution it is provided (which, perhaps, would have been so without any express provision to that effect) that it may do this either in its own name or in the name of its successors or assigns or in the name of the St. Paul and Chicago Railway Company.

On the trial the plaintiff in error offered evidence tending to show that the Minnesota Railway Construction Company did not either in its own name or in the name of its successors or assigns or in the name of the St. Paul and Chicago Railway Company equip or put into operation said railroad or any railroad from St. Paul to Winona or any part thereof or connect said railroad or any railroad by bridge or ferry with the La Crosse, Trempealeau and Prescott Railroad, (see Record, page 18) and asked the court to charge that "it was incumbent on the Minne- "sota Railway Construction Company (in order to comply with "its contract with the city of Winona) either in its own name or "in the name of its successors or assigns or in the name of the "St. Paul and Chicago Railway Company to build, equip and "put into operation a railroad from St. Paul to Winona and to "connect it by bridge or ferry with the La Crosse, Trempealeau "and Prescott Railroad, and the doing of these acts or any of "them by any other company or person except as the agent of or "for the Minnesota Railway Construction Company would not "operate as a performance on its part of said contract," which charge the court refused. (Record, page 27.) On the contrary, the court did charge that the doing of these acts or any of them

by the Winona and St. Peter Railroad Company or by the Milwaukee and St. Paul Railway Company operated as a performance thereof by the Minnesota Railway Construction Company. (Record pages 26, 27.)

This squarely and clearly raises the question, and if this ruling of the court is correct then it necessar ly follows that if the Minnesota Railway Construction Company had immediately after the making of this contract with the city of Winona abandoned its contract with the St. Paul and Chicago Railway Company and had done nothing further in the performance of that contract or in the building, equipping or putting into operation the line of road, but, if on the contrary the St. Paul and Chicago Railway Company had itself, or by other contractors under it, done this work, that performance would have operated as a performance by the Minnesota Railway Construction Company, and the city of Winona would have been liable to it for $100,000 under the above contract.

The case of McLean *vs.* Nugent 33 Wis. 353, is not unlike this. That was an action on a promissory note made by the defendants and running to C. or bearer. The note had been deposited by the defendants with the town supervisors to be by them delivered to C. on condition that by a certain day he should complete a certain road according to contract with supervisors. C did not perform the contract, but another person built the road according to said contract, and the supervisors thereupon delivered the note to the person who built the road. The court in deciding the case said :

"It was competent for the defendants at the time of execut-
"ing and depositing the note to stipulate or make it a condition
"that the note should only be delivered by the depositary to C.
"It was competent for the defendants at that time to agree with

"the supervisors or to say or direct that the note should only be "delivered to C in case he completed the work to the satisfaction "of the supervisors. We know not what interest the defendants "may have had in requiring the note to be delivered to C or in "making it a condition that he should perform the work rather "than that the work should be done by some other person and "the note delivered to that person; nor is it material whether "the defendants had any such interest or not. It was their right "if they chose, without particular interest, to make such condi- "tion, or to give directions that the note should be delivered to "C on his performance of the work," &c. See also the other case cited on this point.

V. As to the fifth point. It will be observed that by the contract entered into by and between the St. Paul and Chicago Railway Company and the Minnesota Railway Construction Company (Record pages 18, 19) that the latter party agreed and was bound to build the road from St Paul to Winona "according to "the directions and in the manner and time which shall be pre- "scribed by said railway company." It will also be observed that the road was built by the Construction Company for the railway company under that contract. (Record page 18.)

This is not a case of mutual promises, for it is expressly provided that "the city of Winona shall have no cause of action "against the Minnesota Railway Construction Company by rea- "son of their failure to build said line of road or any part there- "of." (Record page 17.) The act therefore alleged to be the consideration must have been of benefit to the city of Winona, or loss or inconvenience to the Minnesota Railway Construction Company, in order to support the contract,

2 Kent's Com. 464, 465.

It is not apparent to me how the mere doing of an act by the Minnesota Railway Construction Company which it had contracted with the St. Paul and Chicago Railroad Company to do, and which it had in fact partly performed when the contract with the city of Winona was made and which it subsequently performed under that contract with the St. Paul and Chicago Railway Company, and as and in the manner and within the time required by the contract, could be said to be either a benefit to the city of Winona or a damage or inconvenience to the Minnesota Railway Construction Company.

As the Court of Appeals of N. Y. said in, Home Insurance Company *vs.* Watson, 59 N. Y. 395. "The voluntary perform-"ance of a legal obligation as to the validity of which there is "no doubt will not constitute a sufficient consideration for a con-"tract. By such performance can either party be supposed to "have derived any benefit or sustained any injury ?"

Byles J. in case of Shadwell *vs.* Shadwell gives this reason for the rule : "The reason why the doing what a man is already "bound to do is no consideration, is not only because such a con-"sideration is in judgment of law of no value but because a man "can hardly be allowed to say that the prior legal obligation was "not his determining motive. But whether he can be allowed "to say so or not the plaintiff does not say so here."

9 Com. Bench Reports (99 E. C. L.) 178.

The language applies with great force to the case at bar.

Not only did the defendant in error not pretend to say or prove that the prior legal obligations was not the determining motive of the Minnesota Railway Construction Company in the building of the road to Winona, but, on the contrary, he object-

ed to evidence offered by the plaintiff in error to prove that it was the sole determining motive. See Record page 25.

The court erred in excluding that evidence for it would have clearly proved that the acts done by the Minnesota Railway Construction Company were done under the prior contract, and in pursuance of its covenants and as and in the ~~name~~ manner and within the times therein prescribed.

It would thus have clearly proven that there was no consideration whatever for the contract by the city of Winona to deliver "$100,000" of its bonds. For the court will observe that it is not pretended that the Minnesota Railway Construction Company did *any other act* which could be held a consideration and the plaintiff in error offered but was not permitted to show affirmatively that it did not.

VI. The contract between the Minnesota Railway Construction Company and the city of Winona was merely an offer by the latter subject to be revoked by it before it was acted on by the former, and until it was so accepted or acted on or after it was revoked it was *nudum pactum* and not obligatory on either.

I believe this is an unquestioned legal propositon, and the evidence offered by the plaintiff in error and ruled out would have shown that there had been neither an acceptance of this proposition nor any act done in pursuance of or under it.

Under such circumstances the Minnesota Railway Construction Company could not have compelled the delivery of the bonds and was not entitled to them and the obtaining of them surreptitiously and by the connivance of the depositary and without the knowledge or consent of the city of Winona was illegal and conferred no rights on the wrong doers.

VII.

Such roads are established for the public accomodation and convenience, and it is the duty of the directors to fix the line of route, the stations and depots with reference to such public interest and convenience, and any attempt on part of the Minnesota Railway Construction Company to influence for its own pecuniary benefit the judgment or action of the directors in the performance of this public duty would clearly be against public policy.

VIII. The pretended consideration for the contract between the Minnesota Railway Construction Company and the city of Winona was, in the eye of the law, impossible, and therefore the contract was void.

It was not within the legal capacity of the Minnesota Railway Construction Company to build the roads to any other point than that selected by the St. Paul and Chicago Railway Company or differently or in any other manner than as directed by that company.

The rule is stated by the text writers as follows: A promise is not binding, if the consideration for making it be of such a nature that it was not, in law, in the power of the promisee from whom such consideration moved, to complete such consideration, and confer the full benefit meant to be derived therefrom.

1 Chitty on Contracts (11 Am. Ed. 65.)

A consideration may be impossible, either in fact or in law, that is it may be impossible for a party physically to perform it or it may not be within his legal capacity as if he promise to discharge a party of a debt due to a third person. See Harvey *vs.* Gibbons, 2 Lev. 161.

Lord Kenyon in delivering the opinion of the court in Nerot *vs.* Wallace, said: "The question is whether the verdict can be "sustained on the grounds laid in the declaration and I am clear-"ly of the opinion that it can not. I do not say that this is *nu-*"*dum pactum* but the ground on which I found my judgment is "this, that every person who in consideration of some advantage "to either himself or to another promises a benefit must have "the power of conferring that benefit up to the extent to which "that benefit professes to go, and that not only in fact but in law." 3 Term R. 17.

IX. It is not denied but that the construction of a written document is a matter of pure law for the court where the meaning is to be collected from the document itself—but where the meaning is to be judged of by extrinsic circumstances the construction is a question of fact for the jury.

THOMAS WILSON,
Att'y for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1876.

No. 149.

THE CITY OF WINONA,

Plaintiff in Error,

vs.

N. A. COWDERY,

Defendant in Error.

Error to the Circuit Court of the United States for the District of Minnesota.

BRIEF OF DEFENDANT IN ERROR.

HORACE R. BIGELOW,
HARVEY OFFICER,
Of Counsel for Def't in Error.

Pioneer Press.

Supreme Court of the United States.

THE CITY OF WINONA,
Plaintiff in Error,

vs.

N. A. COWDERY,
Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The St. Paul and Chicago Railway company was originally a part of the old Minnesota & Pacific R. R. Company which was chartered in the year 1857. It was then known as the "Winona Branch" of that road. It subsequently became part of the St. Paul and Pacific Railroad; and afterwards became the St. Paul and Chicago Railway Company. Its charter originally was confined to a road from Winona up the valley of the Mississippi river to St. Paul. It was subsequently authorized to extend its line from Winona to

La Crescent, a point opposite La Crosse, and by a still subsequent act of the Legislature of Minnesota, it was authorized to build from La Crescent to the south line of the State. These acts are all public acts, and as there is no dispute in this case about them, we mention their existence without more particular reference. This was the condition of the charter of the St. Paul and Chicago Railway Co. on the 23d day of April, 1870, the date of the issue of the bonds by the city of Winona, and the making of the contract under which they were deposited in escrow, which will become ths subject of construction by this court.

By this charter the road had to be built to Winona, but by the terms of the charter it was not obliged to cross the Mississippi at Winona; but on the contrary, it being chartered to La Crescent, the probability was that the crossing would be made at the latter point, if at all.

The Milwaukee & St. Paul Railway was then constructed from Milwaukee to La Crosse, and also to Prairie du Chien, and thence to St. Paul, and the only through route of travel from St. Paul to the East was by the way of Prairie du Chien.

There was a railroad in process of construction from a point on the Milwaukee & St. Paul Railway, a few miles east of North La Crosse, to a point on the east bank of the Mississippi river opposite Winona, called the La Crosse, Trempeleau and Prescott R. R.; and if the St. Paul & Chicago Railway could be induced to make a running connection with this last-named road by a bridge or a ferry at Winona, such connection would furnish an unbroken line of travel by railroads through Winona between St. Paul, Milwaukee and Chicago. The people of Winona were very

anxious to secure this result, and to secure it within a certain limited time. They were equally anxious to secure the completion of this La Crosse, Trempeleau & Prescott Railroad within a certain time, and the completion of that part of the St. Paul & Chicago Railway between Minnesota City and Minneiska within a year, and the whole of the road between St. Paul and Winona, except the bridge at Hastings, within three years. They also were desirous of having a truss railroad bridge built across the Mississippi river at Winona.

To secure all these advantages, none of which it had any right to expect from the St. Paul & Chicago Railway Company in the construction of its railway under its charter, the city of Winona proposed to issue its bonds to the amount of one hundred thousand dollars and donate them to the Minnesota Railway Construction Company, which latter company had a contract to build the St. Paul & Chicago Railway, upon condition of these several matters above enumerated being brought about.

In order to accomplish the desired end, the city of Winona, on the 23d day of April, 1870, entered into a written contract with the Minnesota Railway Construction Company, whereby said city agreed to issue its bonds to the amount of $100,000 and place them in the hands of The First National Bank of St. Paul, to be by said bank held in escrow, and to be delivered to the Construction Company upon the performance of the several conditions enumerated in the contract, and if they were not performed, the bonds were to be re delivered to the city of Winona.

(This contract the Court will find in the record on *pages* 15, 16 *and* 17, it being set out in full in the bill of excep-

tions, and in order that no misapprehensions may arise on the subject of what this contract is, we call the attention of the Court to a mistake or misprint in the record on page 11, where the contract is again attempted to be set out as an exhibit to the answer, but in which place it is all omitted but the preamble, a large part of which is also omitted. The Court therefore should confine itself to the contract printed on *pages* 15, 16 *and* 17.)

The Construction Company concluding that it had fulfilled all the conditions of the contract, made proof of the fact to the bank with which the bonds were deposited, and the bonds were, on March 27, 1872, delivered to the Construction Company. N. A. Cowdrey, the plaintiff in the court below, became the owner of ninety of the bonds with their coupons, after the maturity of the latter, and the city of Winona refusing to pay them, he brought this suit to recover the interest due upon them.

The defence, as set up in the answer, is briefly, that the Railway Construction Company had not fiulfilled any of the conditions contained in the contract, and were not entitled to the bonds. The answer is on *pages* 6, 7, 8 *and* 9, of the record, and the particular allegations of the failure of the Construction Company to perform, are on *page* 8 *in folios* 22 *and* 23 of the record.

The proof disclosed the following facts as to the performance on the part of the Construction Company:

1st. That under a contract of date of June 29, 1869, (which is found on *pages* 18 *and* 19 of the Record,) the Construction Company did build for, and in the name of, the St. Paul & Chicago Railway Company, a good and substantial railway, from the city of St. Paul to the city of

Winona, and within the western limits of said city about fifty feet; and there connected such railway with the Winona & St. Peter Railroad, inside of said city limits, within three years from the date of the contract with the city.

2d. That the part of such railway, between a point on the Winona & St. Peter Railroad at or near Minnesota City, in the County of Winona, and the village of Minneiska in Wabasha County, was built within one year from the date of the contract, and was equipped and put into operation within the same time, under a contract between the St. Paul & Chicago Railway Company and the Winona & St. Peter Railroad Company, which is found on *pages* 20 *and* 21 of the record, which contract was made with the assent and approval of the Construction Company; and that this part of the road was operated by the Winona & St. Peter Railroad Company some eight or nine months, and that all the balance of the road between St. Paul and Winona, as the same was completed in sections, was equipped and put into operation by the Milwaukee & St. Paul Railway Company, under contracts in all respects except as to parties, and the portions of road to be equipped and operated, substantially the same as the contract with the Winona & St. Peter Railroad Company, above referred to and found on *pages* 20 *and* 21 of the record.

3d. The La Crosse, Trempeleau & Prescott R. R., from its terminus opposite Winona to a point on the Milwaukee & St. Paul Railway, east of North La Crosse, was built, equipped and put into operation within the year 1870.

4th. A truss railroad bridge was constructed across the Mississippi at Winona, which connected the Winona & St.

Peter Railroad with the La Crosse, Trempeleau & Prescott Railroad at its terminus, as agreed in the contract.

The Winona & St. Peter Railroad, from the point where the St. Paul & Chicago Railway connected with it, fifty feet within the western limits of the city of Winona, continued eastwardly through the city of Winona down to the depot near the western end of the truss bridge and over a long high frestle work up to the bridge, and thence over the bridge to its connection with the La Crosse, Trempeleau & Prescott Railroad at its western terminus opposite Winona

The result of this connection of the St. Paul & Chicago, with the Winona & St. Peter is, that a train coming from St. Paul, would run into the city of Winona fifty feet on the St. Paul & Chicago Railway, it would then pass onto the Winona & St. Peter Railroad and run down through the city of Winona to the depot, and then up the trestle work and over the bridge, on the track of the Winona & St. Peter Railroad, and thence onto the track of the La Crosse, Trempeleau & Prescott Railroad, and over that road eastward to the Milwaukee and St. Paul Railway at a point east of North La Crosse, and thence to Milwaukee and Chicago.

The Plaintiff in Error claims that the contract was not fulfilled on the part of the Construction Company so as to entitle it to the bonds, in the following particulars:

1st. That the building to Winona and connecting with the Winona & St. Peter road, and running over the track of the latter company through the city and over the bridge to the La Crosse, Trempeleau & Prescott road, was not such connection as was contemplated by the contract.

2d. That the equipment and operation of that part of the St. Paul & Chicago road between Minnesota City and Minneiska, by the Winona & St. Peter R. R. Company, with the assent and approval of the Construction Company, was not a compliance with the contract in this respect.

3d. That the equipment and operation of the rest of the St. Paul & Chicago R. R. by the Milwaukee & St. Paul R. R. company was not a compliance with the contract.

The Plaintiff in Error also complains of the various rulings against it which appear in the bill of exceptions.

ARGUMENT.

In presenting and discussing the various questions involved in this case, we will take them up in the order in which they appear in the record. The construction to be placed upon the contract between the city of Winona and the Construction Company, "Exhibit A," on *pages* 15, 16 *and* 17 of the Record, being the controlling one.

It seems a work of supererogation to spend any time before this court on the elementary principles which should govern in the construction of contracts, and what little we shall say on that subject will be more for the symmetry of the argument than for any necessity that exists for it.

The court will endeavor to ascertain what was the meaning of the parties, and to do so, will place itself as nearly in the position of the contracting parties at the time of the making of the contract as it is possible for it to do.

14 *Wisconsin*, 101, *opinion*, 105. *Ib.* 527, *opinion*, 548. 15 *Wisconsin*, 424, *opinion*, 438.

It will then endeavor to view the subject matter in the

light of the surroundings of the parties, and as nearly from their standpoint as possible, so far, and so far only as the language of the contract will permit and allow.

"However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears that the contracting parties proposed to contract, and not others which they never thought of."—*Comyn on Contracts, vol.* 2, *p.* 532. *7th rule of construction.*

"Every treaty, says Vattel, should be interpreted as the parties understood it when it was prepared and accepted.'

2 *Kent's Coms.*, 556–7, *note c.*

It is always a great aid in the construction of a contract, that the contracting parties should have accompanied it with a preamble. In most cases, the parties in a clearly drawn preamble, place their own interpretation upon the contract, and it carries with it a declaration of their meaning and intent.

It has been the rule of the courts to place upon these railroad contracts a very liberal and broad construction, and never a narrow or limited one.

In the case of *R. R. vs. R. R.*, 53 *Penn. St.*, 20, the word "connection" received an interpretation, and it was held that a narrow guage railroad that approached a broad guage railroad, sufficiently near to transfer freight and passengers conveniently, connected with such road, and it was not necessary that the cars of one should be able to run onto the track of the other.

The syllabus of this case will be found on *page* 20, and upon the point in question, is as follows: "Railroad connection, without qualifying terms, means either such a

union of tracks as to admit the passage of cars from one road to the other, or such an intersection of roads as to admit the convenient interchange of freight and passengers, at the point of intersection."

The opinion of the Court will be found, commencing on *page* 55, and extending to *page* 61.

The Court while admitting that the word "connect," in its strictest sense, etymologically considered, means a union, or tying together, are constrained to hold that when used in an act of the Legislature, it must have its popular acceptation, and the same rule of construction is of necessity applicable to a contract, and when used in a contract or similar instrument, will always receive its popular significance, unless there is something in the instrument indicating the intention of the parties to give it a more restricted and narrow meaning.

In *Stodard vs. The Southern Minnesota R. R. Co.*, 6 *Minn. Rep. at page* 150, a railroad was chartered to build a road "up the west bank of the Mississippi River, by the way of Target Lake," an extensive swamp rendered it difficult, and unnecessarily expensive to go nearer than three-quarters of a mile of the lake, and the Court held it a compliance with the charter.

This court has adopted this liberal rule of construction in this character of contract. In the case of *Van Hostrup vs. Madison City*, 1 *Wallace*, 291, the city of Madison was authorized by its charter to "take stock in any chartered company for making 'a road or roads to said city.'" There was a road from Columbus to Madison, and the city took stock in a road from Shelbyville to Columbus: this court held the act of the city authorized by the charter.

its provisions must be regarded as having been well weighed and inserted *ex industria*. If therefore, it had been designed that the road was to be built *to any particular point in the city*, the contracting parties would have designated such point with the same particularity that they stipulated for everything else; and it is very manifest, that this oft repeated provision that the building of the road TO the city, which means *to any point in the city*, would be a fulfillment of the contract as to building or construction, and leaves the whole subject as to the manner of connection with the La Crosse, Trempeleau & Prescott Road, (so that a bridge or ferry was used) entirely open to the discretion of the Construction Company; and when we reflect that the Winona & St. Peter Railroad was then built and in operation exactly on the line from the point where the St. Paul & Chicago Railway must necessarily strike the western limits of the city, down to the depot near where the bridge was expected to be erected, the conclusion is irresistible that this Winona & St. Peter road through the city, was designed by the parties as the medium of connection between the St. Paul & Chicago and the La Crosse, Trempeleau & Prescott Railroads together with a bridge or ferry.

The pretence that the St. Paul and Chicago Railway was to be built *through* the city and over the bridge, so as to make a physical and mechanical connection, or actual joining of the rails with the La Crosse, Trempeleau and Prescott road, is absolutely refuted and answered by the express provisions of the contract that the road was only to be built TO the city, and the absence of any provision that it was to be built to any other point. How easy it would

have been had the contracting parties intended that this actual, physical connection of the two roads should be made, to have provided that in case a bridge was erected, the St. Paul and Chicago Railway should be built down to and over such bridge to the western terminus of the La Crosse, Trempeleau and Prescott road; and if the crossing was made by ferry, then the road should be built down to the bank of the river at the western landing of the ferry. If any such thing had been intended it certainly would have been provided for; the absence of any such provision, taken with the stipulation that the road was to be built to the city, destroys all possible claim for the construction contended for by the Plaintiff in Error.

We have so far discussed the contract upon certain of its provisions only, and without reference to one which was evidently inserted after the main body of the contract had been prepared, and which illuminates the whole subject of how this connection was to be made, to such an extent that no possible doubt can be left concerning it, and actually in express terms stipulates that the connection may be made by means of the Winona and St. Peter Railroad, just as it was done.

The Court will see that the contract in its earlier provisions, contemplates that in making the connection between the St. Paul & Chicago and the La Crosse, Trempeleau & Prescott roads, either a *bridge* or a *ferry* might be used as the link over the Mississippi river, the words "connecting at Winona by bridge or ferry," being repeatedly employed. *Fols.* 44, 46 and 48. But before the contract was finally executed, the city of Winona determined that the bonds should not be delivered to the Construction Company

in any event, unless a bridge was built, so they inserted the following clause, which is found in *folio* 48, near the top of *page* 17 of the record.

"But in no case shall the said bonds, or any part thereof, be delivered by said depositary to the said Minnesota Railway Construction Company, until a truss railroad bridge is constructed across the Mississippi River at Winona connecting the said St. Paul & Chicago Railway, *or the Winona & St. Peter Railroad* with the La Crosse, Trempeleau and Prescott Railroad, at the present terminus of the last named railroad."

Now here we have the key to the whole situation. The object of the transaction as we have before shown, was to secure *an unbroken line of travel from St. Paul through Winona to the East.* It was a matter of no possible importance to the city of Winona, over what particular road this *travel* passed *through* the city, so that the St. Paul & Chicago Railway was so constructed as to bring it TO the city, and continuous tracks of railroads were produced from the end of that road through the city, over the bridge and on to the cities of Milwaukee and Chicago, to convey this travel to those cities.

The positive stipulation for the truss railroad bridge, of course disposed of the ferry, and eliminated that subject from the contract. The establishment of a ferry would not have entitle the Construction Company to the bonds unless a bridge had also been built, but the building of a bridge connecting either the St. Paul & Chicago Railway, (if they should prefer to build it down to and over the bridge,) or the Winona & St. Peter Railroad, (which was already built from the western limits of the city down to

the point where the bridge was expected to be located,) would entitled them to the bonds, without the establishment of the ferry. We claim, therefore, that the insertion of this bridge clause, which was certainly an after thought, supersedes the ferry clause, and leaves the contract for all purposes of construction as if it had never been inserted.

We then have the contract providing, that to entitle the Construction Company to the bonds they were to build the St. Paul & Chicago Railway to Winona, and connect it with the La Crosse, Trempeleau & Prescott road by a truss railroad bridge over which it should run, or the Winona & St. Peter road should run, leaving it wholly optional with the Construction Company to carry the St. Paul & Chicago Railway over the bridge and make an actual and mechanical connection with the La Crosse, Trempeleau & Prescott road, or to build it to any point in Winona and connect it with the La Crosse, Trempeleau & Prescott road by means of the Winona & St. Peter road.

We have always been at a loss to see how there could be two opinions as to the proper construction of this contract on this point. In the two trials which the case had in the Court below, Justices Miller and Nelson reached the conclusion which we contend for without any hesitation.

It may not be amiss, however, to give the definition of the words "connect" and "connection," as we find them in the dictionary most generally in use in America, that of Noah Webster:

"Connect, L. *connecto*, *con* and *necto*. 1. To kint or link together, to tie or fasten together, *as by something intervening*, or by weaving, winding or twining. Hence:

2. To join or unite; to conjoin in almost any manner,

the several acts itself, or made an assignment of the contract, or in some manner was succeeded by some one who could be technically called its successors in its corporate rights, and that as it let out the contract of equipping and operating part of this road to the Winona and St. Peter Company and part to the Milwaukee and St. Paul Company, and as the latter company finally purchased the whole road and has operated it ever since, the Construction Company did not do these things either in its own name or that of its successors or assigns, or in the name of the St. Paul and Chicago Company. The counsel for the Plaintiff in Error has also always claimed that as the charter of the St. Paul and Chicago Railway company required it to build to Winona in any event, the agreement to give the $100,000 was without consideration.

This statement of the theory of the Plaintiff in Error will elucidate some of the propositions to introduce evidence which were overruled by the court, and to which exception was taken.

Before taking up these exceptions separately, we will again to refer to the contract to see if we there find any provisions or language upon which these various claims of the plaintiff in error can find a foundation.

The contract is absolutely silent on the question of the St. Paul and Chicago Railway being built beyond Winona to La Crescent or the south line of the State. There is no word in it from which it can be inferred that the city of Winona desired that it should not be built on beyond the city according to the terms of its charter, and there is not a word or a sign in the contract that indicates that the railroad company proposed to surrender its privilege so to

build, or that the Construction Company had any power or authority to bind them in this respect.

As the court will have observed, the contract is very explicit in all its provisions, and the only construction that can be placed upon it in this respect, is, that if the city of Winona had desired or contemplated anything of the kind, it would have insisted upon its being provided for in the contract. The silence of the contract precludes the possibility of this claim being well founded.

We think that any such provision would have been contrary to public policy had it been inserted in the contract. This St. Paul and Chicago Railway Company is a State land grant railroad. The State of Minnesota, by act of its Legislature of March 6th, 1863, entitled "An Act granting lands to aid the St. Paul and Pacific Railroad Company in the construction of their branch railroad from St. Paul to Winona," which is found on *page* 149 *of the Special Laws of* 1863, granted to said company in aid of this road, fourteen sections of swamp land to the mile, between St. Paul and Winona. (We do not quote from this act, as there will be no question about the fact, and we use it not as the foundation of a right, but simply by way of argument.) If this railroad company chartered to build from St. Paul by way of Winona to La Crescent and the south line of the State, and aided by a grant of 922,880 acres of land, should contract not to build the road beyond Winona, in consideration of a bonus from that city, it would be a fraud on the public, and this court will never imply such an agreement in a contract wholly silent on the subject, where it would be compelled to declared it void for fraud had it been expressed. We will here again cite the case of *R. R. vs. R.*

R, 53 *Penn., State Rep.*, where a similar claim was made by counsel in regard to a transfer of one railroad to another: the road which was transferred enjoyed the privilege of running its cars over the Philadelphia and Erie road for a period of years, and when the transfer was made, it put this privilege in the hands of a road which was a rival of the Philadelphia and Erie, and counsel claimed that the transfer was void without the consent of the Philadelphia and Erie Company. When the privilege was granted, the contract or lease was silent on this point, no consent was required to its going into the hands of any other company, and in answer to this claim of counsel, the court says, at *page* 58:—

"As to the consent of Philadelphia & Erie Company to the transfer, there is nothing in the contract that stipulates for it, and hence we cannot think it necessary; if it was apprehended that the contract might pass into the hands of a rival company, the power of transfer should have been restrained by suitable stipulations. If the legislative authority to transfer did not exist under the acts of 1847 and 1859, the facility with which such authority could be obtained was well known, and should have been guarded against in framing the agreement, but was not. To annex so valuable an appurtenance to the Catawissa road, and make it for twenty years virtually a part of that road without restraint or qualification, was to subject it to the chances of a lease, and to the provisions of all existing and subsequent legislation. It is too late now to complain that it has passed into the hands of a rival."

The pertinency of this reasoning to the case at bar, will be seen by the Court at once. All the claims of the counsel

could have been provided for by suitable stipulations in the contract, but they were not, and it is too late to urge them now. All presumptions are in favor of honesty and good faith, and it is asking too much of this Court to presume that a party intended to act in bad faith to the public, when it has said and done nothing.

There is not a word in the contract that after the various acts contracted to be done, were done, and the unbroken line of travel by railroads between St. Paul and Winona, and Milwaukee and Chicago was established, that it should be maintained for a single day. The whole tenor of the contract makes it clear that there was no obligation on the Construction Company or any one else to to maintain this condition of things for a single day, when once put in operation. The provision of the contract as to the delivery of the bonds to the Construction Company, is as follows:

"But if in each and every of the respects above mentioned the said railroads, and the several parts of said railroads, are built, equipped and put into operation within the times and in the manner above agreed, and said railroad bridge constructed as above provided, then, and in that event, and in that event only, shall the said bonds be delivered to the Minnesota Railway Construction Company by the said depositary." *Folio* 49 *of the Record.* The delivery of these bonds was an acceptance of the work and a payment of the consideration, and terminated all relations between the contracting parties. It is quite evident that the city of Winona was satisfied that the erection of such permanent structures as this truss bridge, and the La Crosse, Trempeleau and Prescott Railroad, and the establishment

of the route East over them, would be ample security for the permanency of the enterprise. It would have been very easy, had the city wanted any security for the maintenance of this route for any specific time, to have postponed the delivery of the bonds until the expiration of such time; but they said not a word on the subject, and relied upon the nature of the work as affording ample safety; and time has fully justified their wisdom in this respect, as the route has been operated daily since its inauguration, and has grown into the principal and most desirable route from St. Paul to the East.

But even if the court should hold that the contract required that the route should be maintained a reasonable time after being put into operation, still it could not hold that this maintenance was a condition precedent to the delivery of the bonds, or that a failure so to maintain it, was any defence to the payment of the bonds or their interest coupons. It could only give the city a claim for damages against the company for a violation of contract, which in its very nature would not even be a set off against the bonds or their interest. The bonds once earned and delivered were valid obligations in the hands of their holders, and could not be affected by any act or failure of the Construction Company happening subsequent to their delivery. As soon as the stipulated acts were done and performed, the bonds were earned, and were deliverable by the terms of the contract, so this point or claim of the counsel for the Plaintiff in Error, that the route was to be maintained after it was established, even if well taken (which we deny) is utterly immaterial to the issues here involved.

The position of the counsel for the Plaintiff in Error, that the equipment and operation of parts or sections of the road by the Winona and St. Peter and the Milwaukee and St. Paul Companies, with the knowledge, assent and approval of the Construction Company, was not a compliance with the contract because not done in the name of the Construction Company, or of its successors or assigns, or in the name of the St. Paul and Chicago Railway Company, does not recommend itself to the favor of the court on account of either merit or good faith, and is based upon the most narrow and purely verbal criticism of the terms of the contract. The only substantial interest the city of Winona had, or could have in this contract, was the performance of its stipulations: *by whom* they were performed, was of course a matter of indifference, so that they were well and properly performed. As concerned the city, the performance was the substance—the party performing the shadow. The stipulation as to the work being done in the name of the successors or assigns of the Construction Company was inserted solely in the interest of the Construction Company, and to provide for the contingency that the Construction Company might wish to procure some one besides itself to do the work, the words "successors or assigns" as employed in the contract mean such person or corporation as the performance of the work should be assigned to, or such as should succeed the Construction Company in its performance; or in other words, such person or corporation as should do the work with the assent or procurement of the Construction Company. These words, used as they are in this contract, can never be held to mean the technical assignees of the company, or such persons as it should

assign its contract to; or the technical successors of the company, or such parties as should succeed it in its corporate franchises; and even if such a construction was admissible, then the Winona and St. Peter Company, which equipped and operated the section between Minnesota City and Minneiska, and the Milwaukee and St. Paul Company, which equipped and operated the balance as it was completed, were the assigns of the Construction Company, because the work done by them was assigned to them to do with the assent and approval of the Construction Company. The evidence on this point is as follows as to the work done by the Winona and St. Peter Company:—

"There was evidence tending to prove that said contract was made with the assent and approval of the said Construction Company; but there was a conflict of testimony on this point." *Folio* 61, *page* 21.

The evidence on the subject of the work of equipment and operation of the other sections of the road by the Milwaukee & St. Paul Company, is, that it was done under contract substantially the same in all respects, except as to the parties thereto, and the parts of the road to be equipped and operated, as the contract made with Winona & St. Peter Company. (Exhibit "C," page 20.) See for this testimony *folios* 62–63, *page* 21.

But this provision in the contract which we have been discussing, provides simply *in what name* the work shall be done. It will be found on *page* 16, *at folio* 46, and is as follows:

"The Minnesota Railway Construction Company hereby on their part, the city of Winona keeping and performing its agreement as herein contained, agree:

"First. To either *in their own name* or in that of their successors or assigns, or *in the name* of the St. Paul & Chicago Railway Company, to build and equip a good and substantial railway," &c.

The whole work was done in the name of the St. Paul & Chicago Railway Company. The road is chartered as the St. Paul & Chicago Railway Company, was built in the name of the St. Paul & Chicago Railway Company, and has always been operated in the name of that Company. When the Winona & St. Peter Company leased a portion of it, and eqipped and operated it for eight or nine months, it was done, both equipment and operation, in the name of the St. Paul & Chicago Railway, and it could not have been done otherwise without an Act of the Legislature allowing it to be done in some other name.

There can be no doubt that the city of Winona received all it contracted for, and that no court would defeat a contract substantially performed by one party, upon the shadowy pretense that it was not done in a certain name, even if that pretense was true; but in this case we have shown that even the claim, or verbal criticism, as it should be more properly called, is unfounded in fact.

POINTS.

The specific points of exception taken by the Plaintiff in Error, will now be briefly noticed in the order in which they appear in the record.

FIRST.

On page 24, *folio* 71. The defendant in the court below offered to prove by J. T. Dodge, that at the time the contract was made by and between the defendant and the Construction Company, (*Exhibit* "A," *pages* 15, 16, 17,) The Milwaukee & St. Paul Railway Company had a railroad running into the city of La Crosse from the East, and that La Crosse is on the east bank of the Mississippi river, 28 miles below Winona.

This the plaintiff below objected to as incompetent, irrelevant and immaterial. The evidence was ruled out and the defendant excepted.

There could be no possible object in the offer to prove these facts, except as showing that the St. Paul and Chicago Railway Company would at some day build its road pursuant to its charter, down to La Crescent, which is opposite La Crosse, and thus establish another through route between St. Paul and the East, by connecting at La Crosse with the Milwaukee & St. Paul at that point. This view is confirmed by the next succeeding offer made by the defendant in *folio* 72, in which he wanted to prove that the St. Paul & Chicago Company actually did build this portion of its road from Winona to La Crescent in the year 1872, which was also ruled out by the court and excepted to by defendant's counsel.

There is nothing in the contract of the Construction Company with the city of Winona, that in any way indicates that the balance of the St. Paul and Chicago Railway was not to be built from Winona to La Crescent, and if the city of Winona had designed that it should not be built, nothing would have been easier than to have insisted upon a

clause to that effect. If such an intimation had been made and the Construction Company had consented, it would have appeared in the contract. The absolute silence of the contract upon the point, sufficiently shows, either that the matter was not the subject of negotiation, or that it was discussed and decided adversely, and omitted from the contract.

The evidence offered, therefore, was wholly immaterial, and was properly rejected by the court. The previous argument of this and the other points involved in the case, renders it only necessary here to state our reasons without discussion.

SECOND.

The next point in order is found in *folio* 73, *on page* 25. The defendant offered to prove that the bluffs along the Mississippi river from Hastings to Winona, are 500 feet high, and approach so close to Winona that a line of railroad could not be built down the valley of the Mississippi river on the west bank past Winona without coming to Winona.

This was ruled out and the defendant excepted.

The only purpose that could have been subserved by this testimony, was to establish that the road had to be built to Winona at any rate, and that the agreement to do what had to be done, was without consideration. The counsel seems to forget that the Construction Company agreed to have it built within three years from April 23, 1870, and connect it by bridge with the La Crosse, Trempeleau & Prescott road. That it also agreed that the part of the road between Minnesota City and Minneiska should be built, equipped

and put into operation within one year from the 23d of April, 1870. That the La Crosse, Trempeleau & Prescott road, between certain points named in the contract, should be built, equipped and put into operation within the year 1870, and that a truss railroad bridge should be constructed across the Mississippi river at Winona, connecting the said St. Paul & Chicago Railway, or the Winona & St. Peter Railroad, with the La Crosse, Trempeleau & Prescott road at a stipulated point.

We claim that each one of these several agreements was to do something to the advantage of Winona that the Construction Company was under no obligation to do, except by reason of the contract with the city, and each one of them was an adequate consideration to support the contract. As Justice Miller expressed it, "The contract bristles all over with consideration." *See contract, Exhibit "A," pages* 15, 16, 17; *and contract, Exhibit "B," pages* 18 *and* 19.

THIRD.

The next offer was to prove that the Chicago & Northwestern Company built the truss bridge at Winona, and that the La Crosse, Trempeleau & Prescott road was built by the La Crosse, Trempeleau & Prescott Company. *Folios* 73, 74.

This evidence was clearly immaterial, because the Construction Company had only stipulated that these structures should be built—the road in a given time, and the bridge before the bonds were delivered; but no obligation is assumed by the Construction Company that any particular interest or party should build them. As soon as as they

were built the contract was fulfilled, no matter who built them. *See contract, Exhibit "A," pages* 15, 16 *and* 17.

FOURTH.

The next offer (*folio* 74, *page* 25,) was to prove that no company but the Milwaukee & St. Paul had any right to run its cars over the Winona & St. Peter road for the past seven years for a distance of five miles west of the bridge.

The purpose of this evidence could only be, to show that neither the St. Paul & Chicago Company, nor the Construction Company, had operated that portion of the Winona & St. Peter road which forms the connecting link between the St. Paul & Chicago road, just inside of the western limits of the city, and the La Crosse, Trempeleau & Prescott road.

There is no claim in the case that the St. Paul & Chicago road was ever operated except by the Winona & St. Peter Company for the eight or nine months which that company operated it between Minnesota City and Minneiska, and by the Milwaukee & St. Paul Company during the rest of the time, both of which companies operated it in the name of the St. Paul & Chicago, partly under leases, and the Milwaukee & St. Paul Company finally under a purchase. (*Exhibit "D," pages* 22, 23.) The Winona & St. Peter Company of course had the right to use its own road, and if the Milwaukee & St. Paul Company enjoyed the same right over this connecting link of it, it was certainly immaterial whether any other company had any right to run cars over it or not, and the court correctly ruled the evidence out.

FIFTH.

The next proposition contains several distinct features, and if either of them were inadmissible the whole were properly excluded, but we claim none of them were admissible. They are in substance as follows (*folio* 75):—

1st. That the road from St. Paul to Winona was built under the contract, (*Exhibit* "*B*," *pages* 18, 19,) and as required by the St. Paul & Chicago Company, one of the parties to that contract.

2d. That the bonds and coupons were obtained by the Construction Company from the depositary surreptitiously and by the connivance of the depositary.

3d. That the bonds and coupons were delivered to the Construction Company without the knowledge or consent of the city of Winona.

Each and all of these propositions were clearly immaterial and irrelevant to the issues, and were properly excluded. We will briefly examine them separately.

What possible difference can it make to the city of Winona under what contract the Construction Company built the road from St. Paul to Winona, if it was built in accordance with the contract between the city and the Construction Company? The provision of this latter contract concerning the building of the road is as follows. (*See folio* 46, *page* 16.)

"The Minnesota Railway Construction Company hereby on their part * * * agree: *First.* To either in their own name or that of their successors or assigns, or in the name of the St. Paul & Chicago Railway Company, build

and equip a good and substantial railway from the city of St. Paul to the city of Winona, excepting a bridge across the Mississippi river at Hastings," &c.

We can see no object in this offer, except perhaps the counsel for the defendant may claim, that as the Construction Company had this contract (*Exhibit* "*B*," *pages* 18 *and* 19,) to build the road as required by the St. Paul & Chicago Company at the time it entered into the contract with the city of Winona. (*Exhibit* "*A*," *pages* 15, 16, 17.) It was only agreeing by the latter contract to do what it was bound to do by the former, and that the contract with the city was therefore without consideration and void.

We have fully considered the subject of the considerations which support this contract under *point two*, and we think have demonstrated that the considerations were numerous and adequate. We therefore dismiss this branch of defendant's proposition with a reference to our point two.

As to the offer to prove that the bonds and coupons were obtained by the Construction Company from the depositary surreptitiously, and by the connivance of the depositary. It must be manifest at a glance that in this action, that whole matter is immaterial and irrelevant. If the Construction Company earned the bonds by a performance of its contract with the city, then what difference can it make to the city how it obtained the bonds from the depositary? Suppose it had broken into the vault of the bank and stolen them, after having earned them by a performance of the contract, why should the city complain? It would not change its position in any way. When called upon to pay principal or interest on these bonds, suppose it should set up as a defence that the Construction Company having

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 149.

THE CITY OF WINONA,

Plaintiff in Error,

vs.

N. A. COWDREY,

Defendant in Error.

Reply to Points of Plaintiff in Error.

HORACE R. BIGELOW,

HARVEY OFFICER,

Of Counsel for Def't in Error.

Pioneer Press.

Supreme Court of the United States.

THE CITY OF WINONA.
Pl'ff in Error.
vs.
N. A. COWDREY,
Def't in Error.

As to the point of the jurisdiction of the circuit court in the cause made by the counsel for the plaintiff in error we submit the following answers:

FIRST.

The action is brought upon coupons which are made payable to the bearer.

This Court has frequently held that a note or other instrument payable to the bearer, is payable to anybody, and is not affected by the disabilities of the nominal payee, or of any antecedent holder. They pass from hand to hand by delivery, and there is no transfer or assignment of them at all, and that they are not within the proviso to the 11th section of the Judiciary Act at all.

Bank vs. Wister, 2 *Pet.* 318.

Syllabus.—"A note payable to bearer, is payable to any-

body, and is not affected by the disability of the nominal payee to sue."

Bank vs. Ashley, 2 *Pet.* 327.

The same plea was filed to the jurisdiction in this case in the case of Bank vs. Wister, and that case is held to dispose of this on that point. *Opinion, page* 328.

White vs. R. R. Co., 21 *How.* 575.

Syllabus.—"Bonds issued by a R. R. company in Massachusetts, payable in blank, no payee being inserted, and issued to a citizen of Massachusetts, which had passed through several intervening holders, could be filled up by a citizen of New Hampshire, payable to himself or order, and then suit could be maintained upon them in the circuit court of the United States for Massachusetts."

See opinion page 576–7.

Bushnell vs. Kennedy, 9 *Wallace*, 387.

Opinion 391.—It has been held that suits upon notes payable to a particular person or to bearer, may be maintained by the holder without any allegation of citizenship of the original payee, though it is not to be doubted that the holder's title to the note could only be derived through transfer or assignment."

City of Lexington vs. Butler, 14 *Wallace*, 282.

Syllabus. "Negotiable paper (within which class coupons to municipal bonds if having proper words of negotiability, fall) is not regarded as falling within the exception to the 11th section to the Judiciary Act."

Opinion, page 293: "Neither bonds of the kind nor the coupons annexed, where they are made payable to bearer, or are endorsed to bearer by the original obligees or payees, are regarded as falling within the prohibition of the elev-

enth section of the Judiciary Act, as they pass from one holder to another by delivery, and without any formal assignment, as has been held by this court in several cases to which reference is made for the reasons upon which the rule is founded." *Citing* 21 *Wal.* 576; 3 *Wal.* 331, 9 *Wal.* 387.

Bonifee vs. Williams, 3 *How.* 574.
Bradford vs. Jenks, 2. *McLean C. C. R.* 130.
Bullard vs. Bell, 1 *Mason*, 251.

SECOND.

This court will always presume, in a case of this kind, where no question is raised as to the jurisdiction in the court below, that evidence was given showing the citizenship of all parties and their assignors to be such as to give the court jurisdiction.

Bank vs. Moss, 6 *How.* 31.

Syllabus.—"Where the record showed that two negotiable notes were declared on by the endorsee against the maker, and there was no averment which showed that the payee was competent to sue the maker in a court of the United States, but the declaration also contained the money counts for a sum large enough to cover the verdict and judgment, *Held*, that the court would intend either that the recovery was not had on the notes, or if it were, *that evidence of the necessary citizenship of the payee was given at the trial.*"

Fully sustained by the opinion on *page* 37.

As to the intendments that this Court will make in support of the judgments of the Circuits, see also,

Coffee vs. Bank, 13 *How.* 183.

THIRD.

The complaint had the necessary averments of citizenship of the parties to give the Court jurisdiction. If the defendant wished to make a question of want of jurisdiction by reason of the status or citizenship of any party not a party to the record he should have pleaded it in abatement, a plea to the merits waived it.

Rule ten of this Circuit adopted June 23, 1871, is as follows:

"X. Matters of abatement on account of the character of the parties shall be alleged by plea in abatement before answer to the merits, and shall be first determined, when such order in respect to the prosecution or defense of the case, shall be made by the Court as in each case shall seem just."

This is a Law Rule.

Smith vs. Kernochen, 7 *How.* 198. *Opin.* 216.
DeWolf vs. Robaud, 1 *Pet.* 476.
Evans vs. Gee, 1 *Pet.* 80.
Sims vs. Hundley, 6 *How.* 1.
Jones vs. League, 18 *How.* 404.
DeSobry vs. Nicholson, 3 *Wal.* 420.

H. R. BIGELOW, and
HARVEY OFFICER,
Of Counsel for the
Def't in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

THE FARMERS' LOAN AND TRUST COMPANY,

ag'st

THE CENTRAL RAILROAD COMPANY OF IOWA.

Southern District of New York:

ROSEWELL G. ROLSTON, being duly sworn, says that he is the President of the Farmers' Loan and Trust Company, complainants herein.

That in the latter part of March, 1876, R. L. Ashhurst and John H. B. Latrobe, claiming to represent bondholders of the defendant railroad, applied to the complainant for what they termed *the use of its name*, in a motion they proposed to make to dismiss the appeal herein. In reply, the complainant wrote a letter, in which it suggested that it did not think, as a trustee representing all parties, it could consent to do this, as that course would be throwing the weight of a position which should be impartial in favor of a motion, which, if successful, would prevent the appellants from obtaining what the trustees' counsel considered to be their legal rights, on appeal, but that the complainant would appear by its own counsel when the motion should be made. That subsequently, in October, 1876, the Circuit Court made an order, from which the following is an extract:

"It is ordered that the trustee shall give its permission to the said Ashhurst and others, the joint committee of bondholders, the right and privilege to use its name for the purpose of making in the Supreme Court a motion to dismiss the appeal, or any other motion which by them may be deemed necessary to fully protect their interests in such appeal."

That the complainant, on receiving a copy of this order, sent the attorney of the Committee a copy thereof, with a letter from which the following is an extract:

"The Farmers' Loan and Trust Company, as such trustee, hereby gives you the permission, right and privilege which it is directed to give by said order."

And further deponent saith not.

R. G. ROLSTON.

Sworn to before me, this seventeenth day of Nov., 1876.

J. T. WATERS,
Notary Public.

[L. S.]

In the Supreme Court of the United States.

THE FARMERS' LOAN AND TRUST CO.,
Complainants.

and

RUSSELL SAGE and others,
Intervenors and Appellants.

against

THE CENTRAL RAILROAD COMPANY OF IOWA, and others,
Defendants and Appellees.

No. 731.

Motion to advance the cause, etc:

And now, this 20th day of November, 1876, come before the Court Herbert B. Turner and B. F. Lee, on behalf of the Farmers' Loan and Trust Company, of the City of New York, and move to advance this cause on the docket of this Court.

And in support of this motion they produce in Court the transcript of the record of this case and the affidavit of R. G. Rolston, and thereupon show the following facts:

This suit was brought by the complainant, The Farmers' Loan and Trust Company, in the United States Circuit Court for the District of Iowa, to foreclose the mortgages made by the Railroad Company to the Trust Company, as trustee, to secure bonds, etc.

A decree was made at the October Term of the Circuit Court, bearing date October 22d, 1875.

The intervenors, at the same term of that Court, January 10th, 1876, filed a petition to be made parties for the purposes of an appeal. This was granted, and the security fixed at one million dollars. The intervenors did not furnish this, but were subsequently allowed by Mr. Justice Miller to appeal on giving security in the amount of $20,000, which they did.

In March, 1876, the complainant was requested by Messrs. R. L. Ashhurst and John H. B. Latrobe to give them *the use of its name* in a motion to be made in this Court to dismiss the appeal, but did not consider it consistent with its duties to other bondholders to do so.

Subsequently the Circuit Court ordered the complainant to give the parties so requesting it the use of its name in said motion, which order was at once complied with.

A statement of these facts is deemed necessary in order to explain the position of the complainant as to counsel.

The first mortgage in suit contains the following agreement:

"And it is further covenented and agreed by and between the parties hereto that in case of any judicial foreclosure sale, or other sale of the premises embraced in this mortgage, under the decree of any Court having jurisdiction thereof, based upon the foreclosure of this mortgage, and the holders of a majority of the then outstanding bonds secured by this mortgage, shall in writing request the said trustee, or their successor, they are authorized to purchase the premises embraced herein, for the use and benefit of the holders of the then outstanding bonds secured by this mortgage."

Supreme Court of the
United States.

THE FARMERS' LOAN AND TRUST
COMPANY,
Complainants,

vs.

RUSSELL SAGE, AND OTHERS,
Intervenors and Appellants,

vs.

THE CENTRAL RAILROAD COMPANY
OF IOWA, AND OTHERS,
Defendants.

Motion to Advance Cause on Docket.

HERBERT B. TURNER,
B. F. LEE,
of Counsel.

The decree, after authorizing and directing the complainant to bid, provided: "That if said trustee, as aforesaid, shall become the purchaser of said property at such sale, the title shall pass absolutely to said trustee, subject, however, to the trusts herein indicated on behalf of the several parties in interest, being the first, second and third mortgage bondholders, creditors and stockholders of the Central Railroad Company of Iowa, and said property shall be conveyed by said trustee to a corporation organized, or to be organized, for the purpose of acquiring said property, under the provisions of said first mortgage and of this decree, and to be approved by a majority of said first mortgage bondholders, in which said corporation the controlling interest and power of management shall be given to the first mortgage bondholders, in such manner as the majority of such first mortgage bondholders shall indicate and provide, and in which the second mortgage bondholders shall receive a second class of stock for the full amount, principal and interest, of said second mortgage bonds; and in which corporation the third mortgage bondholders and general creditors shall receive common stock at par for the respective amounts due them, and in which the stockholders of the defendant shall receive common stock at the rate of one dollar in the new corporation for every three dollars of stock held by them in the defendant corporation."

The decree also contained the following clause:

"*Eighth.*—That the right of the several parties to this suit claiming liens by judgment or otherwise, upon the property of defendants, and of the several parties claiming rights or equities in and to said property, or any property in the use of said railroad company or any part thereof, by virtue of contracts, or cases whereby material, labor or property has been furnished for or placed upon said defendants' road, shall not be affected by this decree, the same being taken subject to the rights and equities of said parties, as the same may be established and declared hereafter by this court."

The appeal taken by the intervenors, we understand to be so taken, mainly, if not altogether, by reason of the above quoted provisions of the decree. No question is raised respecting the amount due, or the amount which must be paid to redeem. The questions arising affect solely the mode in which the sale is to be made, and the disposition which is to be made of the proceeds, and to what claims the property shall be sold subject. The decree constitutes the Trust Company trustee for subsequent encumbrancers, creditors and stockholders. The appellants are understood to claim that any sale made under the above cited clause of the mortgage must be for the benefit of the holders of first mortgage bonds only.

It is respectfully submitted that as the property is in the hands of a Receiver, and the bondholders can realize no advantage from it in its present shape, the case commands itself strongly to this Honorable Court, as one which it will dispose of out of its order, and to which it will give a preference, and as a motion is made to dismiss the appeal, the Trustee now moves that the cause may be heard on its merits with such motion.

HERBERT B. TURNER,
B. F LEE,
of Counsel.

Lot No. 1 is the property in dispute. The dotted lines together with Lot No. 1 represent the property covered by the mortgage.

BODFISH MILL.

BODFISH CANON.

NORTHERLY BOUNDARY OF SALSIPUEDES RANCHO.

NARROW STREAM WITH RUNNING WATER.

SANTA CLARA COUNTY

LOT No. 1,
1021 78/100 ACRES.

LOT No. 4,
197 1/2 ACRES.

LOT No. 3,
162 178/1000 ACRES

LOT No. 2,
200 ACRES.

RED OAK.

PASTURE FENCE

Point S is a Post from which a forked Red Oak marked B T bears S. 65° W. 38 links.

PARTITION FENCE.

POINT OF BEGINNING.

SANTA CRUZ COUNTY

PARTITION FENCE

N.
W. E.
S.

VAR. 15° 30' E

MAGNETIC.

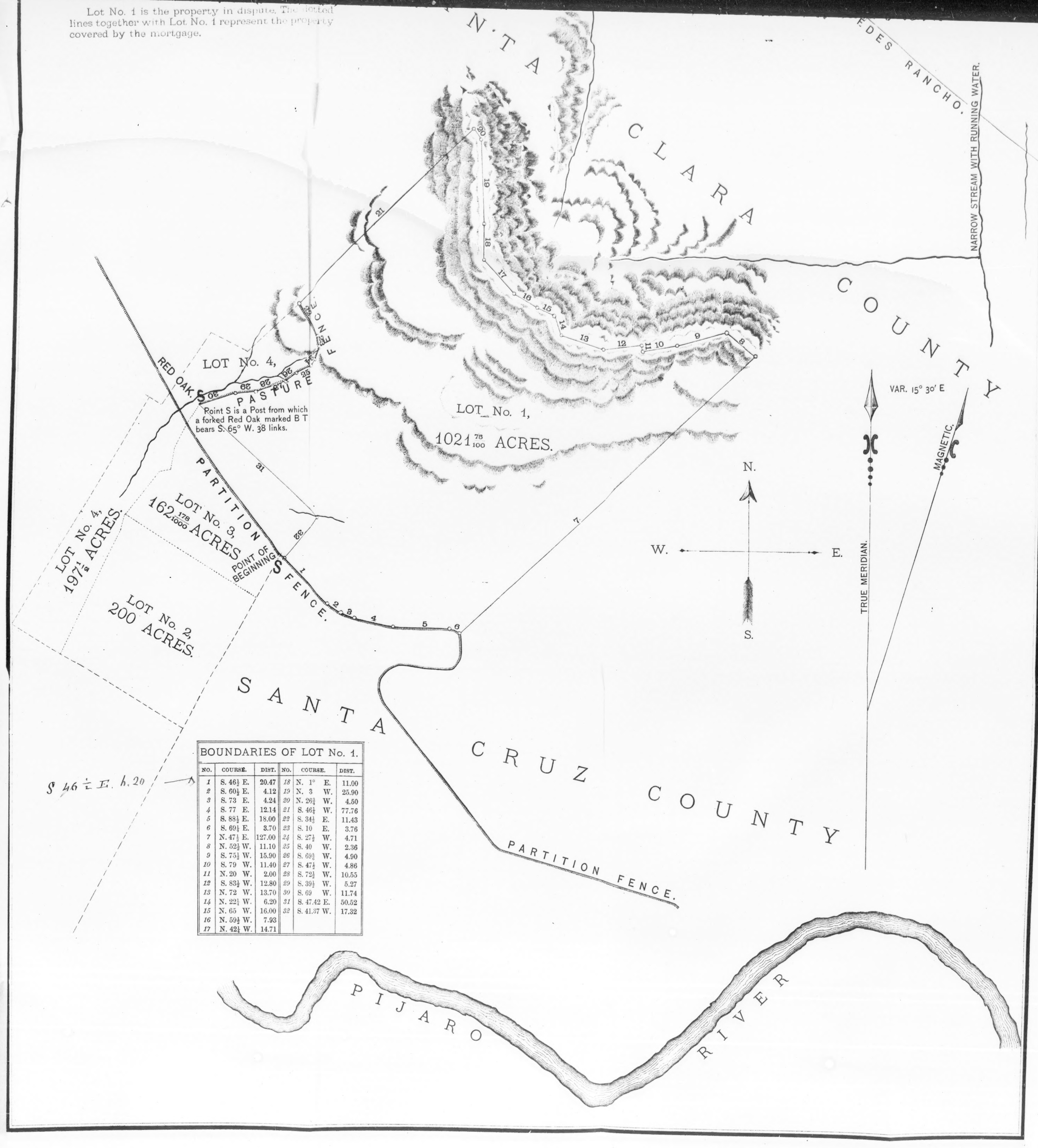
TRUE MERIDIAN.

BOUNDARIES OF LOT No. 1.

NO.	COURSE.	DIST.	NO.	COURSE.	DIST.
1	S. 46½ E.	20.47	18	N. 1° E.	11.00
2	S. 60½ E.	4.12	19	N. 3 W.	25.90
3	S. 73 E.	4.24	20	N. 26¾ W.	4.50
4	S. 77 E.	12.14	21	S. 46½ W.	77.76
5	S. 88½ E.	18.00	22	S. 34½ E.	11.43
6	S. 69½ E.	3.70	23	S. 10 E.	3.76
7	N. 47½ E.	127.00	24	S. 27½ W.	4.71
8	N. 52½ W.	11.10	25	S. 40 W.	2.36
9	S. 75½ W.	15.90	26	S. 69⅝ W.	4.90
10	S. 79 W.	11.40	27	S. 47½ W.	4.86
11	N. 20 W.	2.00	28	S. 72½ W.	10.55
12	S. 83½ W.	12.80	29	S. 20½ W.	5.27

S 46 ½ E. h. 20

Lot No. 1 is the property in dispute. The dotted lines together with Lot No. 1 represent the property covered by the mortgage.



BOUNDARIES OF LOT No. 1.

NO.	COURSE.	DIST.	NO.	COURSE.	DIST.
1	S. 46½ E.	20.47	18	N. 1° E.	11.00
2	S. 60½ E.	4.12	19	N. 3 W.	25.90
3	S. 73 E.	4.24	20	N. 26¾ W.	4.50
4	S. 77 E.	12.14	21	S. 46¼ W.	77.76
5	S. 88½ E.	18.00	22	S. 34¼ E.	11.43
6	S. 69¼ E.	3.70	23	S. 10 E.	3.76
7	N. 47½ E.	127.00	24	S. 27½ W.	4.71
8	N. 52½ W.	11.10	25	S. 40 W.	2.36
9	S. 75½ W.	15.90	26	S. 69⅝ W.	4.90
10	S. 79 W.	11.40	27	S. 47½ W.	4.86
11	N. 20 W.	2.00	28	S. 72½ W.	10.55
12	S. 83½ W.	12.80	29	S. 39½ W.	5.27
13	N. 72 W.	13.70	30	S. 69 W.	11.74
14	N. 22½ W.	6.20	31	S. 47.42 E.	50.52
15	N. 65 W.	16.00	32	S. 41.37 W.	17.32
16	N. 59½ W.	7.93			
17	N. 42¼ W.	14.71			

S 46 ½ E. h. 20

North.

ST. JOSEPH
LIVINGSTON
Chillicothe
CALDWELL
CLINTON
Plattsburg
CHARITON
Keytesville
RANDOLPH
Huntsville
MONROE
RALLS
HANNIBAL
Quincy
Monroe City
New London
Frankfort
Louisiana
Whitehall
Illinois River
CARROLL
Carrollton
De Witt
Brunswick
RAY
Richmond
PLATTE
CLAY
Liberty
Bowling Green
Clarksville
PIKE
Laddonia
Centralia
AUDRAIN
Mexico
Jefftown
Wellsburgville
Glasgow
Fayette
Saling
HOWARD
Lexington
Marshall
SALINE
Independence
KANSAS CITY
Higginsville
Pink Hill
Freeman
LAFAYETTE
JACKSON
Columbia
Booneville
BOONE
LINCOLN
Troy
MONTGOMERY
Danville
Fulton
COOPER
CALLAWAY
Big Spring
Warrenton
WARREN
ST. CHARLES
St. Charles
Hamburg
St. Louis
ST. LOUIS
EAST ST. LOUIS
Belleville
New Bloomfield
St. Auburn
Hibernia
JEFFERSON CITY
Tipton
California
MONITEAU
Georgetown
Sedalia
Warrensburg
Pleasant Hill
Holden
JOHNSON
PETTIS
Harrisonville
CASS
COLE
OSAGE
CASCONADE
FRANKLIN
JEFFERSON
Versailles
MORGAN
HENRY
Clinton
BINION
Germantown
Warsaw
MILLER
MARIES
Pitosi
BATES
Butler
Osceola
ST. CLAIR
CAMDEN
HICKORY
CRAWFORD
Potosi
WASHINGTON
ST. GENEVIEVE
PHELPS
PULASKI
VERNON
Ft. Scott
Nevada
KANSAS

North.

Vol. 296, Callaway County, Page 336
vs.
Foster

ILLINOIS

Chillicothe
LIVINGSTON
CALDWELL
CHARITON
Keytesville
RANDOLPH
Huntsville
MONROE
RALLS
HANNIBAL
Monroe City
New London
Frankfort
Louisiana
Quincy
Whitehall
Illinois River
CARROLL
Brunswick
De Witt
Carrollton
RAY
Richmond
Bowling Green
Clarksville
PIKE
Laddonia
Centralia
AUDRAIN
Mexico
Jefftown
Hallsville
Glasgow
Fayette
Saline
HOWARD
Lexington
Marshall
SALINE
Wellsburgville
LINCOLN
Troy
Higginsville
LAFAYETTE
Creenton
Columbia
BOONE
Booneville
MONTGOMERY
Danville
Fulton
CALLAWAY
Big Spring
Warrenton
WARREN
ST. CHARLES
St. Charles
ALTON
COOPER
Warrensburg
Georgetown
Sedalia
JOHNSON
PETTIS
Holden
New Bloomfield
St. Auburn
Hambury
St. Louis
ST. LOUIS
EAST ST. LOUIS
Tipton
California
MONITEAU
Hibernia
JEFFERSON CITY
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OSAGE
FRANKLIN
Versailles
MORGAN
HENRY
Clinton
BINION
JEFFERSON
Germantown
Warsaw
MILLER
MARIES
Osceola
ST. CLAIR
CAMDEN
HICKORY
CRAWFORD
Potosi
WASHINGTON
ST. GENEVIEVE
PHELPS
PULASKI